No. 80-415

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

RAILWAY LABOR EXECUTIVES' ASSOCIATION,

Appellant,

v.

WILLIAM M. GIBBONS, Trustee of the Chicago, Rock Island and Pacific Railroad Company, Debtor; CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as Indenture Trustee; FIRST NATIONAL BANK OF CHICAGO, as Indenture Trustee; HENRY CROWN, et al.; THE UNITED STATES OF AMERICA; THE INTERSTATE COMMERCE COMMISSION; and NEIL P. GOLDSCHMIDT, Secretary of Transportation,

Appellees.

On Appeal From The United States District Court For The Northern District Of Illinois, Sitting As A Railroad Reorganization Court

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SUPPLEMENTAL APPENDIX TO APPELLEES' MOTION TO AFFIRM

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December 17, 1980

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APPENDIX A

TRANSCRIPT OF PROCEEDINGS BEFORE JUDGE McGARR

September 21, 1979
(Pages 7–11)

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN THE MATTER OF:	)	
	)	
CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY,	)	No. 75 B 2697
	)	
Debtor.	)	

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled matter before the HONORABLE FRANK J. MC GARR, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois on Friday, the 21st day of September, 1979, at the hour of 4:00 o'clock p.m.

PRESENT:

MR. WILLIAM M. GIBBONS

Trustee;

MR. NICHOLAS G. MANOS
MR. O. L. HOUTS
(332 South Michigan Avenue
Chicago, Illinois 60604)

appeared on behalf of the Trustee;

JENNER & BLOCK
(One IBM Plaza, 42nd Floor
Chicago, Illinois 60611) by
MR. ALBERT E. JENNER, JR.
MR. DANIEL R. MURRAY
MR. CARTER H. KLEIN and
MS. LINDA MULLENBACK

appeared on behalf of certain intervenors;

MR. MANOS: I won't give my view, I will just state the facts.

THE COURT: Let Mr. Manos state his current status in the matter.

MR. MANOS: Your Honor, the fact of the matter is that President Carter yesterday exercised his presidential powers and created, or announced the creation of an emergency board. Now I won't go into details relative to the Executive Order. It is a short one. It is dated September 20th, 1979 from the White House. Most of the details relative to the Executive Order are contained in the media, but nevertheless, for the record, let me state -- let me read it into the record, if I may, your Honor, it is a very short one.

THE COURT: All right.

MR. MANOS: This is an Executive Order, this is dated from the White House, September 20th, 1979 creating an emergency board to investigate disputes between the Chicago, Rock Island, Pacific Railroad and Peoria Terminal Company and the Brotherhood of Railway, Airline & Steamship Clerks, Freight Handlers, Express and Station Employees and the United Transportation Union.

"Disputes exist between the Chicago, Rock Island & Pacific Railroad and Peoria Terminal Company and certain of its employees represented by both the Brotherhood of Railway, Airline & Steamship Clerks, Freight Handlers,

Express and Station Employees and the United Transportatio
Union. These disputes have not heretofore been adjusted under the provisions of the Railway Labor Act as amended, and these disputes in the judgment of the National Mediation Board threatens substantially to interrupt interstate commerce to a degree such as to deprive a section of the country of essential transportation service Now, therefore, by authority vested in me by Section 10 of the Railway Labor Act as amended, 45 United States Code 160, it is hereby ordered as follows: Section 1-101. Establishment of Board: There is established a Board of three members to be appointed by the President to investigate these disputes. No member of the Board shall be peculiarly or otherwise interested in any organization of railroad employees or any carrier. Section 1-102, report: The Board shall report its findings to the President with respect to these disputes within thirty days from the date of this order. Section 1-103. Maintaining conditions: As provided by Section 10 of the Railway Labor Act as amended, from this date and for thirty days after the Board has made its report to the President. No change, except by agreement, shall be made by the Chicago, Rock Island, Pacific Railroad and Peoria Terminal Company, or by its employees, in the conditions out of which these

disputes arose."

Your Honor, while we have not been formally served by anybody with the Executive Order we have a copy of it and we acknowledge that the Order was entered by the President. We need no formal announcement of the fact.

Your Honor, this morning Mr. Gibbons sent telegrams to Mr. Fred Kroll, and also to Mr. Chester, the gentlemen representing the Brotherhood of Railway, Airline & Steamship Clerks and the United Transportation Union, respectively. The telegram in content is the same as to each gentleman, and I would like to read that into the record.

"Concerning President Carter's appointment of an emergency board to review our dispute to accomplish orderly return of employees to work, in accord with our returning business, we require your prompt cooperation. Please advise when UTU" --

and the other telegram, your Honor, obviously it said "BRAC."

"-- Please advise when UTU will comply with President Carter's Executive Order."

Now, your Honor, this was signed by the Executive Vice-President of the Railroad. We have not received a response to the telegram from the Brotherhood of Clerks. We have received, as of September 21st at 2:16 p.m. a telegram from Mr. L.H. Chester, the President of the United Transportati Union addressed to the Executive Vice-President, Mr. Mitros

of the Rock Island Railroad.

"IN RE: Your telegram September 21, 1979. Alleged appointment of emergency board, Rock Island Railroad. Upon receipt of official notification of President Carter's Executive Order and appointment of an emergency board we will advise you the UTU return to work arrangements."

This is signed L.H. Chester, President.

Your Honor, to this moment we have not received, but hopefully and expectantly are awaiting a response from BRAC. We are quite anxious, your Honor, and the Trustee is quite anxious to meet with the two Unions and to arrange a back to work, in line with the Executive Order of President Carter.

THE COURT: It is not unreasonable to assume, since you didn't receive an official service of the order, and UTU said they haven't received it, that maybe nobody as yet received it.

MR. MANOS: Your Honor, I do believe it has been entered. I saw President Carter announcing the Board --

THE COURT: I am sure it's been entered, the President has announced it, the Fedral Railway Administrator called me and said that it had been entered. I suppose if the Unions are taking a position that until it is served upon them they are not going to recognize it we have to deal

with that position. Go ahead.

MR. MANOS: Now, your Honor, with respect to today's status report hearing. Your Honor knows that late in the month of August, I believe August 27th or 28th, the strike occurred. The strike was brought first by BRAC and then by UTU. I won't go into the details that led to the strike by the two Unions, and which included then a walk-out by all of the other unions.

Since that date the Rock Island, in the exercise of its common carrier obligation, has been operating to the best of its ability, which leads us to today's status report with respect to cash and the cash requirement attendant -- the on-going strike operation of the Trustee.

Now, your Honor, I have noted as I walked into this courtroom the presence of many parties in interest. They are parties in interest. I have noticed the representativ and the attorneys of BRAC present in the courtroom. They have a right to be here, and certainly they have an urgent interest in the proceedings.

I have noticed that there are representatives of UTU. They equally have a right to be here.

I have noted the presence of a gentleman, and other parties, that represent various public interests, State and Federal. And, of course, the ever present creditors of the Chicago, Rock Island Railroad, the two banks and,

APPENDIX B

TRANSCRIPT OF PROCEEDINGS BEFORE JUDGE McGARR

January 25, 1980

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN THE MATTER OF:	)	
	)	
CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY,	)	No. 75 B 2697
	)	
Debtor.	)	

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled matter before the HONORABLE FRANK J. MC GARR, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois on Friday the 25th day of January, 1980, at the hour of 2:00 o'clock.

PRESENT:

MR. WILLIAM J. GIBBONS,

appeared as Trustee;

MR. NICHOLAS J. MANOS
MR. O. L. HOUTS
(332 South Michigan Avenue
Chicago, Illinois 60604)

appeared on behalf of the Trustee;

JENNER & BLOCK
(One IBM Plaza, 42nd Floor
Chicago, Illinois 60611) by
MR. ALBERT JENNER, JR.
MR. DANIEL R. MURRAY
MR. CARTER KLEIN
MS. LINDA MULLENBACH

appeared on behalf of certain intervenors;

MR. JENNER: And I report to you that because of Mr. Bannister's presentation. Your Honor said to that Committee, there is a public interest involved in these proceedings, in all these reorganizations. There are also the creditors that must be protected to the extent it is possible to protect them and not yielding to states or others at the expense of the creditors.

During the course of these proceedings your Honor has repeated that. And I say that to your Honor solely because Mr. Bannister has said today what he said during the first day of these proceedings before your honor, that he cares for the State of Iowa, and I don't blame him for that, and its shippers, but at the expense of everybody else and all other public interests and the creditors of this corporation.

THE COURT: I think I have heard enough of what has probably been the best oral arguments I have had the pleasure of listening to from the various attorneys involved in this case. I think I have heard enough, in addition to having studied enough of the proposed plan of reorganization and the viable core and the Peat-Marwick study to reach a conclusion which I intend to announce concerning the matters that have been debated here today.

Preliminarily, though I find it disappointing in this focus on whether I should substitute my judgment

for the Interstate Commerce Commission, and decline to forward a plan to them that the Commerce Commission is not represented here. I regret that fact and candidly don't quite understand it. They have been here on other occasions when their presence was much less helpful than it would be now.

Let me indulge in a little bit of reminiscence and history about the Rock Island since the fateful St. Patrick's Day when it first came to my attention.

I appointed as Trustee and attorney for the Trustee two gentlemen in whom I had a great deal of confidence and my confidence in them has never diminished, and I have over the years indulged their sincere hope and expectation of an income based reorganization of the Rock Island. I have admired the Trustee's resourceful effort to achieve this, and I think with the creditors I shared his frustration, when an extremely difficult winter, and rising fuel cost, and disappointing traffic statistics intervened to really doom those efforts and to bring us to a state of cashlessness which we faced some several weeks ago. I have always indulged the hope of what I think is probably the gist of what I expressed before the Senate Committee that Congress would see its obligation if the public interest were really to be served here, to address its attention to the Rock Island as it did to the

Eastern Railroads which were the result of Con-Rail to the passenger service, with the result of Amtrak, and to the recent action to the Milwaukee, with sufficient help to bring about what I think was what Mr. Gibbons once described as Farm-Rail, which I thought was an excellent term to describe what I hoped we could achieve here. I watched the attempts of the Trustee and his counsel to sell off segments of the Rock Island, and have been disappointed, with one happy exception, there have been no tangible results from that acitivity, despite strenuous efforts.

I pushed Mr. Manos, in terms of timetable, in the filing of a plan of reorganization to the point where when I saw him on the street and noted his declining weight I had a severe attack of conscience because I was afraid I was driving him into bad health. I have listened to the Trustee for years through his counsel argue that I authorize and continue to be patient with the attempts to bring about a cash-based reorganization, based upon my finding of reorganizability. Mr. Manos argues in an abundanc of emotion today that I should not decide that issue in four hours. I have in fact thought of very little else for four years. It has been the basic issue that I have confronted and the issue which I have had to decide over and over again as circumstances changed.

The concept of liquidation of a railroad

means tremendous hardship, economic dislocation, the public interest has always been on the side of my hope of continued operation, if not in whole or at least in part of the Railroad. I have until now balanced the equities of the rights of the creditors against the public interest in favor of continuing operations. I have watched the Trustee do what I regard as a masterful job but it has not succeeded because success was not possible as somebody argued today, except under a set of perfect economic and social circumstances, and life being what it is that perfect set of circumstances never came to pass.

I have had an opportunity to go over the plan of reorganization. It is not a liquidation plan. It is a plan for reorganization of a proposed viable core. Liquidation is there only as an alternative possibility, as the creditors have argued, and the details of a plan of liquidation might be quite different than the details of a plan of reorganization, particularly in the area of priority and creditors' rights. So we have a basic reorganization plan which acknowledges the possibility of liquidation but is not a liquidation plan.

We went through a lot of travail, all of us, spent a lot of hours, missed a lot of dinner dates in constructing the framework for the final appointment of a Court's witness to determine the possibility of

reorganizability. And we wound it up in the unusual position of having, because of the intervention of cashlessness, having to force the filing of a plan of reorganization at about the same time as we were completing a study as to the potential of reorganizability so that the plan and the Court's witness study reached me at approximately the same time.

I have studied the plan of reorganization, as I said, and I have studied the Peat-Marwick report, my own witness. I am satisfied that the witness that the parties recommended to me and whom I chose has done a fine job. It is a good study and I am compelled to accept its conclusions. This being so I am compelled also, if logic prevails, to accept the conclusion that the plan of reorganization proposed by the Trustee has no hope of success.

The Trustee is therefore instructed not to forward the plan of reorganization to the Commission. The Trustee is instructed to continue his present plans for cessation of operations by the time of the anticipated termination of the directed service order with the hope that that might be extended, and the Trustee is instructed to prepare and file with the Court a preliminary plan of liquidation by a date which I will let him pick since only he can tell me how much time he thinks is necessary for

him to do that.

Before I finalize that order I would like to say that this ruling, in my judgment, means only that the final and inevitable decision that I have just made will have little effect on the public interest. It does now what would inevitably be done in a matter of a few months and it starts now rather than later the process of private sale and Commerce Commission reorganization of railroad service in order to patch together the best possible compromise between the public interests and the creditors' interests. And I guess it finalizes what will be the last chapter in the long and regrettably sad history of the Rock Island.

That will be the order based on the motion made today, and I would ask Mr. Manos, if you care to comment now or wish to reflect on it how much time you think it would take to prepare a liquidation plan which will be a modification I would guess of your reorganization.

MR. MANOS: Your Honor has not commented on the rebuttal to the PMM study that I placed --

THE COURT: I have not accepted your filing of the rebuttal of the PMM study. I decline to do so for the reason that I have read the PMM study. I have listened to comments on it today. I have indicated that in the main I accept it. I would expect that there might be

APPENDIX C

REPORT OF EMERGENCY BOARD NO. 191

October 22, 1979

REPORT

TO

THE PRESIDENT

BY

EMERGENCY BOARD

NO. 191

APPOINTED BY EXECUTIVE ORDER 12159, DATED SEPTEMBER 20, 1979, PURSUANT TO SECTION 10 OF THE RAILWAY LABOR ACT, AS AMENDED.

To investigate disputes between Chicago, Rock Island and Pacific Railroad Company and certain of their employees represented by the United Transportation Union and the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes.

(National Mediation Board Case Nos. A-10287, A-10303, A-10324, A-10313 and A-10314)

WASHINGTON, D. C.

October 22, 1979

Washington, D. C.

October 22, 1979

The President
The White House
Washington, D. C.

Dear Mr. President:

On September 20, 1979, pursuant to Section 10 of the Railway Labor Act, as amended, and by Executive Order 12159, you created an Emergency Board to investigate disputes between the Chicago, Rock Island and Pacific Railroad Company and certain of its employees represented by the United Transportation Union and the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes.

Following its investigation of the issues in dispute, the Board developed recommendations that were accepted as the basis for a settlement of those issues that separated the parties from agreement.

The Board now has the honor to inform you of a settlement of the issues out of which these disputes arose and to submit its Report concerning the recommendations that led to the settlement.

Respectfully submitted,

James J. Reynolds
Chairman

Ida Klaus
Member

Nicholas H. Zumas
Member

I. CREATION OF THE EMERGENCY BOARD

Emergency Board No. 191 was created by President Carter on September 20, 1979, by Executive Order No. 12159, pursuant to Section 10 of the Railway Labor Act, as amended (45 U.S.C. 160).

The creation of the Emergency Board was based upon the recommendation of the National Mediation Board (NMB) because of the existence of a strike by the United Transportation Union (UTU) and the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes (BRAC) against the Chicago, Rock Island and Pacific Railroad Company (Rock Island), which the NMB found was depriving the Middle West of essential transportation service.

The strike followed a long period of unfruitful negotiations between the parties which commenced in early 1977, mediatory efforts by the NMB, rejection of proffers of arbitration, and rejection of the recommendations of a Special Board of Inquiry by one of the labor organizations.

The President appointed the following members of the Board: James J. Reynolds, former Under Secretary of Labor and retired President of the American Institute of Merchant

Shipping, Washington, D. C., chairman; Ida Klaus, member of the New York State Public Employment Relations Board, Attorney and Labor Arbitrator, New York, New York, member; Nicholas H. Zumas, Attorney and Labor Arbitrator, Washington, D. C., member.

II. HISTORY OF THE DISPUTES

The Rock Island is the fourth largest rail carrier of grain in the western region of the United States, operating over some 7,500 miles of track in 13 midwestern states.[1/] Since March 17, 1975, the Rock Island has been in reorganization under Chapter 77 of the Bankruptcy Act under the direction of a trustee appointed by the U. S. District Court for the Northern District of Illinois, Eastern Division.[2/] BRAC represents some 1,600 employees on the Rock Island. UTU represents some 2,500 employees on the property. These employees are organized in three branches: UTU(E) representing firemen, UTU(S) representing switchmen, and UTU(T) representing conductors and brakemen.

1/ Currently, the Rock Island's operations are being conducted by Kansas City Terminal Railway Company under the Directed Service Order of September 26, 1979, issued by the Interstate Commerce Commission.

2/ The Court directed the Trustee on October 10, 1979, to present a plan of reorganization or a plan of liquidation within 60 days.

The BRAC-Rock Island Dispute

On April 1, 1977, pursuant to Section 6 of the Railway Labor Act, BRAC served the Rock Island with a Notice of its desire to revise wages and work rules. On April 28, 1977, an initial conference was held to discuss the revisions sought by BRAC. At this conference, the Carrier informed BRAC that it would not grant the National Railway Labor Conference (NRLC) power of attorney to negotiate wages and work rules on a National basis for the Rock Island. The Rock Island determined to proceed with negotiations separately. The Rock Island did not submit formal Section 6 Notices at that time, but submitted a number of proposed rules changes for informal discussion with BRAC.

During the negotiations in 1977 no agreement was reached. On December 22, 1977, the Rock Island elected to serve formal Section 6 Notices. On January 10, 1978, BRAC served additional Section 6 Notices for concurrent handling. Negotiations on the formal Section 6 Notices began in January 1978 and continued at various times through August 1978, with no agreement.

On August 8, 1978, BRAC invoked the services of the National Mediation Board (NMB).[3/] Mediation sessions were held in January and May of 1979. On June 20, 1979, the NMB

3/ The case was docketed as NMB Case No. A-10313. A companion case involving the Peoria Terminal was docketed as NMB Case No. A-10314.

proffered arbitration, which was rejected by the Carrier and accepted by BRAC. On August 11 and 17, 1979, the NMB resumed "mediation in the public interest" in Washington, D. C.; however, no agreement was reached. On August 28, 1979, BRAC struck the Rock Island.

The UTU-Rock Island Dispute

On January 3, 1977, the three branches of UTU served Section 6 Notices for changes in wages and work rules. An initial conference was held on these Notices on February 1, 1977, at which time it was agreed to suspend further negotiations until a later date. The Rock Island served its Section 6 Notices on August 29, 1977. Supplemental Section 6 Notices were served by the parties between September 1977 and July 1978.

Negotiations between the Rock Island and each of the three branches of UTU were conducted separately. Bargaining with UTU (E & S) commenced in September 1977, and with UTU(T) in October 1977. The negotiations with the three branches continued at various dates through August 1978, and one joint session was held on March 22, 1978. On June 15, 1978, UTU(T) invoked the services of the NMB.[4/] On July 12, 1978, and on August 23, 1978, UTU(S) and UTU(E), respectively, also invoked

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4/ The case was docketed as NMB Case No. A-10324.

the services of the NMB.[5/] Mediation sessions were held on both a separate and joint basis on various dates between September 1978 and March 1979. While these sessions did not produce a settlement, the focus of the dispute was narrowed.

On April 6, 1979, the NMB proffered arbitration to the parties, which was ultimately rejected by both parties. Mediation was resumed on May 21, 1979, and on May 23, 1979, the parties agreed to a mediator's proposal to establish a Special Board of Inquiry to investigate and make recommendations concerning the issue of retroactive pay. The Special Board began hearings on July 26, 1979, and issued its Report and Recommendations on August 27, 1979. Two days later, UTU struck the Rock Island.

Following the strikes by BRAC and UTU, the National Mediation Board held further "mediation sessions in the public interest" on September 11, 1979.

III. ACTIVITIES OF THE EMERGENCY BOARD

The Board convened in Washington, D. C., on October 2, 1979, for on-the-record ex-parte hearings with BRAC and on October 3, 1979, with UTU. Similar on-the-record ex-parte hearings were held with the Rock Island on October 4, 1979, concerning its dispute with BRAC, and on October 5, 1979, concerning its

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5/ These cases were docketed as NMB Case Nos. A-10303 and A-10287, respectively.

dispute with UTU.

Transcripts and exhibits submitted to the Board were exchanged at the direction of the Board. After a recess to provide time for a careful review of the materials exchanged, the Board commenced a series of off-the-record discussions with the Rock Island on October 11, 1979. A series of off-the-record discussions was commenced with BRAC on October 13, 1979, and with UTU on October 15, 1979. These discussions provided the Board with further views on the issues in dispute, and with reactions to what had been presented by the other side in each of the disputes.

The Board commenced intensive mediation efforts on October 16, 1979. While these efforts were helpful in narrowing the areas of dispute, several key issues remained unresolved. The Board therefore concluded that the best course of action in aiding the parties to reach a final agreement would be to make recommendations and urge their acceptance as a basis for settling all unresolved issues. During the following two days, these recommendations were presented to the parties. On October 18, 1979, they were accepted as a basis for agreement on all unresolved issues.

IV. ISSUES

Out of this long history of unsuccessful negotiations and mediation efforts, there emerged two major issues. On

the one hand, the Rock Island, experiencing severe financial difficulties, was determined to obtain substantial relaxation of work rules which it insisted were inhibiting its ability to effectively operate its rail system. On the other hand was an equally determined adherence by the labor organizations to the preservation of the principle of full retroactivity in this industry. Both BRAC and UTU were seeking application of some benefits of their National wage settlements with NRLC, some aspects of which went back to January 1, 1978.

In the case of BRAC-represented employees, the period of retroactivity ended on October 5, 1979, when BRAC returned to work under the ICC Directed Service Order. In the case of UTU-represented employees, the period of retroactivity ended on May 1, 1979, when National wage rates were implemented on the Rock Island pursuant to the May 23, 1979, agreement reached under the auspices of the National Mediation Board.

As early as 1977, the Carrier contended that it could not and would not pay any retroactive wages because of its precarious financial condition, as evidenced by its bankruptcy and the creditors' demand for liquidation of the railroad. It was the Rock Island's position in negotiations that, while retroactive pay was out of the question, it would, upon necessary rules modifications, pay the National wage scale under the following conditions:

A. The full National wage scale would become effective on January 1, 1978, if settlement was reached in 1977.

B. The full National wage scale would become effective on the first day of the calendar month in which negotiations were concluded, for settlements reached on or after January 1, 1978.

The Rock Island recognized in 1977 that certain unions negotiating at the National level might not reach agreement with the NRLC until some time after January 1, 1978, and that the amount due its employees under the first alternative could not be calculated until National settlement. It did not view payment of the increased wages as retroactive because agreements under the first alternative above were reached prior to the effective dates specified in the National Agreement, and the Carrier had the benefit, as of January 1, 1978, of the rule relief sought. Thus, cost savings could begin to provide the resources needed to pay the National rate, and the funds could be realized pending resolution of the National rate. Five unions settled their negotiations with the Rock Island in 1977 under the first alternative.

Seven unions settled with the Rock Island in 1978 or 1979. In each of those instances, the National wage rate became effective on the first day of the calendar month in which agreement was reached. Retroactivity was "waived" in

the various agreements for periods ranging from two to twelve months. In no case did the Rock Island agree to pay the higher rate retroactive to January 1, 1978, although the Carrier did agree in these negotiations to do so if either BRAC or UTU was successful in obtaining retroactivity. Rock Island based its unwillingness to pay retroactive wages on the ground that if it did not obtain any rule relief from these unions during the retroactive period, it would experience no gain in productivity to help offset the higher operating costs that would result. The Carrier asserted that BRAC and UTU could have received the National wage rate at any time had they been willing to reach agreement on certain proposed rules and rules changes sought by the Rock Island.

Finally, the Carrier asserted that it could not pay retroactive wages, even if it desired to do so, because it had no cash, and would not be able to generate sufficient funds in the foreseeable future. Rock Island estimated that the total cost of retroactivity would approximate $14 million.

BRAC rejected the Rock Island's arguments primarily on the ground that retroactive wage adjustments are a traditional and expected part of collective bargaining in the railroad industry. That Union asserted that the Rock Island has a moral, if not legal, obligation to make the full wage pattern of the National Agreement applicable to the Rock Island.

BRAC also viewed the bargaining context between itself and the Carrier as being substantially different from the negotiations involving the unions that had settled with the Rock Island. It contended that those unions were asked to make minor or insignificant rules changes that had little impact on earnings or employment in those crafts or classes. By contrast, the demands made upon its members would, if granted, lead to a significant reduction in the number of BRAC-represented employees. In particular, BRAC pointed to the Rock Island's proposals regarding the Train Order Rule and the Holiday Work Rule. The greater complexity of the negotiations involving BRAC would, under the best of circumstances, have led to prolonged and difficult negotiations. This being so, it was the Union's position that it was unfair to penalize its members by refusing to consider retroactive wages as an essential part of the final agreement.

The UTU arguments were in many respects similar to those of BRAC. The rules sought by the Rock Island, particularly in the area of Short Haul-Gathering Service, were complex and far more extensive than the rules changes sought from the non-operating unions. The Rock Island-UTU negotiations were further hampered by the need to coordinate the negotiations among the trainmen, enginemen, and switchmen, and by the interrelationship of UTU with other crafts, especially the

Brotherhood of Locomotive Engineers.

Moreover, UTU asserted that the Rock Island's failure to grant retroactivity in December 1973, at the time that all other issues had been tentatively resolved, was the major factor in the mounting retroactivity claim.

Ancillary issues existed in both disputes, generally involving the Carrier's need for productivity savings to generate resources to pay for the settlement.

In the case of UTU, the most important productivity issue was the Rock Island's proposed Short Haul and Gathering Service agreement. The Carrier wanted to institute these new services as a means of generating additional business. Institution of these services would permit the Rock Island to compete more successfully with the trucking industry.

Articles X and XI of the UTU National Agreement were also in issue, because Rock Island wanted the benefits of the relief afforded to other railroads under the National Agreement.

In the BRAC dispute, the Rock Island sought to suspend for a time the penalty provisions of the Train Order Rule, so that operating craft employees could write train orders. The Carrier also wanted to add an exception to the Rule which would make it inapplicable at blind sidings, upon reinstatement of the Rule.

The Rock Island also sought to amend the Holiday Work Rule to eliminate the requirement that every job be filled on a holiday. It also wanted to reduce the entry rates for new employees during the first two years of employment.

BRAC sought to increase per diem and mileage allowances, and to increase the coverage of the Job Stabilization Program by covering employees who entered service on the Rock Island prior to 1972. BRAC also sought to apply the National Agreement on the Rock Island, except to the extent that the parties provided otherwise.

V. THE BOARD'S RECOMMENDATIONS

The Recommendations made by this Emergency Board were predicated on two conditions: (1) That the Rock Island would resume operations as a reorganized viable entity bearing the approval of the ICC and the District Court; and (2) That there would be a relaxation by the labor organizations of certain work rules, and a willingness to accept innovations, both of which would generate additional productivity savings.

These Recommendations set forth below, were accepted by the parties as the basis for settlement.

Emergency Board No. 191 recommends the following settlement of the dispute between the Chicago, Rock Island and Pacific Railroad and the United Transportation Union:

I. Retroactive Pay

A. The Rock Island will pay full retroactivity under the terms of the National Agreement for the period of January 1, 1978, to April 30, 1979, upon assumption of operations by a successor company under a plan of reorganization approved by the Interstate Commerce Commission and confirmed by the U. S. District Court..

B. Payments will be made in sixteen (16) equal monthly installments, beginning during the first month of operations as outlined in paragraph I.A. above.

II. Wages, COLA, Rules

A. The parties agree to adoption of the May 23, 1979, Memorandum of Agreement and Letters of Understanding covering increased wage rates, COLA, and rule changes affecting the UTU (T), (E), and (S) crafts, effective upon assumption of operations.

B. Articles X and XI of the National Mediation Agreement of August 25, 1978, shall be adopted. National interpretations of these articles shall be applied.

C. The Rock Island will withdraw the Carrier's promulgated rules of August 29, 1979, covering the UTU (T), (E), and (S) crafts.

III. Short Haul - Gathering Service

The parties will adopt the May 23, 1979, Short Haul-Gathering Service Agreement. The UTU General Chairmen will meet with the Rock Island to draft the necessary implementing agreements for the principles contained in the Short Haul-Gathering Service Agreement. The parties will negotiate any additional changes, amendments, or clarifications as may be necessary to assure the success of these new services.

IV. Interchange

The parties agree to negotiate a settlement of the "interchange" dispute.

* * * * * * *

Emergency Board No. 191 recommends the following settlement of the dispute between the Chicago, Rock Island and Pacific Railroad and the Brotherhood of Railway and Airline Clerks:

I. Retroactive Pay

A. The Rock Island will pay full retroactivity under the terms of the National Agreement for the period of January 1, 1978, to October 5, 1979, upon assumption of operations by a successor company under a plan of reorganization approved by the Interstate Commerce Commission and confirmed by the U.S. District Court.

B. Payments will be made in sixteen (16) equal monthly installments, beginning in the first month

of operations as defined in paragraph I.A. above.

II. Wages

A. The wage and COLA provisions as set forth in the National Agreement between BRAC and the National Railway Labor Conference, bearing an effective date of January 30, 1979, shall be applied to the employees, to become effective upon assumption of operations. In applying this section, wage increases and COLA due after said start-up date will be applied on the dates set forth in the National Agreement.

B. Article VIII - Entry Rates, of the National Agreement, effective January 30, 1979, is hereby modified to provide for entry rates of 85% of the basic rate during a new employee's first year of service and 92% for the second year of service, effective upon assumption of operations.

III. Per Diem & Mileage

All existing rules and agreements dealing with traveling away from assigned headquarters point will be amended to provide:

(A) Lodging expense provided for in Article I, Section A(3) shall be increased from $4.00 per day to $7.00 per day;

(B) Meal allowances provided for in Article I, Sections B(1), B(2) and B(3) shall be increased from $1.00, $2.00, and $3.00 per day respectively to $1.75, $3.50 and $5.25, respectively;

(C) The allowance for the use of an employee's personal automobile provided for in Article I, Section C(2) shall be increased from twelve (12) cents a mile to fifteen (15) cents a mile; and

(D) The maximum reimbursement for meals and lodging costs provided for in Article II, Section 3 shall be increased from $7.00 per day to $12.25 per day.

IV. Job Stabilization

The applicable Job Stabilization Agreement (February 7, 1967), will be revised and amended to provide:

(A) Employees having an employment relationship with the carrier as of December 31, 1971 shall be placed in protected status;

(B) The protected rates of pay for all employees covered by the revised Agreement shall be the rate of pay of the position occupied on August 1, 1979, or the protected rate in effect, whichever is higher, subject to subsequent increases; and

(C) In instances where employees are drawing furlough allowances, the allowance will be reduced by any compensation the employee receives under the Railroad Unemployment Insurance Benefits Act, and any compensation received from full time employment in outside industry, obtained following the date of furlough.

(D) Any employee on furlough as of the date of assumption of operations will be covered upon return to service.

(E) A protected employee shall have his protected allowance suspended after five years in furlough status, provided, however, that the full protected status of such employee shall be fully restored upon recall to service.

(F) The parties will negotiate guidelines which will be applied in the consolidation of seniority districts.

V. WORK RULES

A. Train Order Relief. During the first 24 calendar months immediately following assumption of operations, BRAC agrees to waive the three-hour and eight-hour penalty provisions of Rule 17 - Train Orders, provided however, that during said 24 month period, no position handling train orders will be abolished because of or as a result of this waiver.

Prior to the end of the 24 month period, the parties will review the experience under the waiver, with a view to possible extension or modification.

Upon expiration of the 24 calendar month period referred to herein, any work diverted from the craft or class here represented will be returned to coverage by this Agreement, at which time the Rule 17, Paragraph 3(2), will be amended to provide the following exception: "3(2)(d) - That when train orders are relayed from the nearest open train order office on the seniority district involved to train or engine service employees at blind sidings."

B. Holiday Work. Article 54 - Holiday Work, will be amended by addition of the following:

(a) When a holiday falls on a work day of a regularly assigned employee and his (her) position is to be worked, the regular employee is entitled to be used.

(b) When necessary work on two or more positions on the same shift is to be performed by one employee, it will be offered in seniority order to employees occupying the positions involved with the highest rate of pay of the position worked.

(c) When positions to be filled are vacant because of the regular occupant being permitted to lay off, or because there is no regularly assigned incumbent on the holiday, the opportunity to fill the vacant position will be offered to qualified regularly assigned employees on the same shift at the same location whose positions were pulled off or combined with others. If not filled in this manner, the vacancy will be filled in accordance with Article VIII or IX of Rule 13.

C. Vacations. The vacation provisions of the National Agreement referred to above will be made effective and applied upon assumption of operations, but in no event earlier than January 1, 1980.

D. The Rock Island will withdraw the Carrier's promulgated rules of August 29, 1979, covering the BRAC-represented employees.

VI. National Agreement

The parties agree that the National Agreement between

BRAC and the National Railway Labor Conference signed on January 13, 1979, and effective nationally on January 30, 1979, shall be applied except to the extent set forth above.

Respectfully submitted,

James J. Reynolds
Chairman

Ida Klaus
Member

Nicholas H. Zumas
Member

APPENDIX D

COMPLAINT OF THE TRUSTEE AND CREDITORS FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

June 5, 1980

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In the Matter of CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, Debtor, WILLIAM M. GIBBONS, as Trustee of the Chicago, Rock Island and Pacific Railroad Company, Debtor; CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as Indenture Trustee; THE FIRST NATIONAL BANK OF CHICAGO, as Indenture Trustee; and HENRY CROWN, et al., Plaintiffs, v. THE UNITED STATES OF AMERICA; THE INTERSTATE COMMERCE COMMISSION; and NEIL GOLDSCHMIDT, United States Secretary of Transportation, Defendants.	In Proceedings for the Reorganization of a Railroad No. 75 B 2697

COMPLAINT FOR DECLARATORY JUDGMENT
AND INJUNCTIVE RELIEF

This action is brought by the Trustee and creditors of the estate of the Chicago, Rock Island and Pacific Railroad Company ("the Rock Island"), which is now in liquidation, to enjoin the enforcement of the Rock Island Railroad Transition and Employee Assistance Act ("the Rock Island Act" or "the Act"). The plaintiffs also seek a declaration that the Rock Island Act is unconstitutional under the Fifth and Fourteenth Amendments to the United States Constitution, on the grounds

that it imposes a debt on the Rock Island estate which constitutes an uncompensated taking of private property for public purposes, and by that and other provisions violates the plaintiffs' due process and equal protection rights, the constitutional separation of powers principle, and the principle that laws respecting bankruptcy must be uniform. In support thereof, the plaintiffs, by their attorneys, state as follows:

Jurisdiction and Venue

1. This Court has jurisdiction under Section 77 of the Bankruptcy Act. Jurisdiction also arises under 28 U.S.C. §1331(a), in that the matter in controversy arises under the Constitution and laws of the United States. This Court also has jurisdiction of this action under the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, because the plaintiffs seek a declaration of their rights and further relief concerning an actual controversy otherwise within this Court's jurisdiction.

2. Venue is proper in this District under 28 U.S.C. §1391(e), in that the causes of action alleged involve the United States and its officers and agents acting in their official capacities. The United States of America and the Interstate Commerce Commission both maintain offices in this District in Chicago, Illinois. The Rock Island maintains its principal place of business in this District, and the Rock Island estate owns real property in this District

which would be affected by the actions sought to be enjoined.

3. This action is brought as part of the proceedings for the reorganization of a railroad, In re Chicago, Rock Island and Pacific Railroad Company, No. 75 B 2697 ("the reorganization proceedings"), because it relates to property included in these proceedings.

The Parties

4. Plaintiff William M. Gibbons is Trustee of the Chicago, Rock Island and Pacific Railroad Company, Debtor ("the Trustee"). The Rock Island is a railroad which the defendant Interstate Commerce Commission has found to be cashless, and therefore without further common carrier responsibilities. Pursuant to the order of the Reorganization Court of January 25, 1980, the Rock Island is now in the process of liquidation under the supervision of the Trustee. The Trustee is responsible for the preservation and disposition of the assets of the Rock Island estate pursuant to Section 77 of the Bankruptcy Act and the orders of the Reorganization Court. Under the Rock Island Act, he is charged with the responsibility for negotiation of an agreement implementing its provisions concerning labor protection. Under Section 106 of the Act, he is subject to an order of the bankruptcy court, which must direct implementation of an employee protection arrangement imposed by the defendant Interstate Commerce Commission. Section 110(b) of

the Rock Island Act provides that obligations guaranteed by the United States government to implement any employee protection arrangement under it "shall be treated as an administrative expense of the estate of the Rock Island Railroad." The Rock Island Act therefore purports to impose on him new obligations which directly conflict with his existing duties to preserve the assets of the estate and the interests of all of its creditors and shareholders and would impair his ability to carry out these duties.

5. The plaintiffs, Henry Crown, et al., hold substantial blocks of Rock Island common stock, first mortgage bonds, and income debentures. The Crown plaintiffs have been found by the Reorganization Court to have a "substantial interest in the Rock Island." They were permitted to intervene in these proceedings, and have actively participated in all other proceedings relating to the Rock Island estate. The interest of the Crown plaintiffs would be substantially impaired by the imposition of $75,000,000 in priority debt for labor protection costs as contemplated by the Act.

6. Plaintiff First National Bank of Chicago ("the First National Bank") appears as Trustee under the First Mortgage Indenture. The imposition of the $75,000,000 administrative expense debt contemplated by the Act may substantially impair the interests of holders of first mortgage bonds, whom it represents as Trustee.

7. Continental Illinois National Bank and Trust Company of Chicago ("Continental Bank") appears as Trustee under the Income Debenture Indenture. The imposition of the $75,000,000 priority debt contemplated by the Act would substantially impair the interests of holders of income debentures, whom it represents as Trustee.

8. The defendant Interstate Commerce Commission is the federal agency responsible under the Rock Island Act for imposing a labor protection arrangement upon the estate of the Rock Island in the event that the unions representing former employees of the Rock Island and the Trustee cannot agree on a labor protection arrangement.

9. The defendant United States of America, acting through the Secretary of Transportation, shall guarantee obligations of the Rock Island incurred through the imposition of labor protection charges under the Act. Obligations guaranteed by the United States under tbe Act would be treated as an administrative expense of the Rock Island estate.

FACTUAL ALLEGATIONS

History of Prior Proceedings

10. The Rock Island filed a petition for reorganization pursuant to Section 77 of the Bankruptcy Act in the District Court for the Northern District of Illinois on March 17, 1975. Despite the protestations of the railroad's

creditors, the Reorganization Court found that a successful reorganization was "not clearly impossible," and authorized the Trustee to pursue an income-based reorganization.

11. From March 1975 through January 1980 the Reorganization Court and the Trustee sought to serve the public interest through reorganization rather than liquidation. During the four and one-half year period from January 1975 through June 1979, the Rock Island suffered losses in excess of $157 million, thereby reducing the value of the creditors' security in at least that amount.

12. During the attempted reorganization period, the jobs of Rock Island employees were preserved, at a cost to the Rock Island of almost one billion dollars in wages and benefits and at a cost to the plaintiff creditors and shareholders in excess of $150 million in operating losses.

13. Despite the critical cash position of the Trustee, on August 28, 1979, its employees struck the Rock Island. On September 20, 1979, the President of the United States appointed an Emergency Board pursuant to Section 10 of the Railway Labor Act, thereby mandating a return to work by the Rock Island employees. The employees defied the law and refused to return to work.

14. As a result of this strike, the cash reserves of the Trustee were further depleted. On September 26, 1979, the Interstate Commerce Commission found the Rock Island to be cashless, rendering its continuing operations impossible, and ordered directed service by the Kansas City

Terminal Railway Company ("the KCT"), and, thereafter, by other companies, to ensure the continued operation of rail service over Rock Island lines.

15. During this period of subsidized directed service, the jobs of all Rock Island employees were preserved through their employment by directed service carriers without regard to the carriers' need for their services. Their employment during this period was directly subsidized by the federal government at a cost to it of over $70 million dollars.

16. After the period for subsidization of directed service under the statute expired on March 23, 1980, the Interstate Commerce Commission authorized non-subsidized "permissive" directed service to continue over Rock Island lines. Such "permissive" directed service operations over some Rock Island lines continues to the present date.

17. Throughout the period during which service over the Rock Island's lines has been maintained under directed service orders, the value of the Rock Island estate has continued to erode. In particular, the estate has not received adequate compensation for the use of its lines and facilities in the public interest.

18. On January 25, 1980, the Reorganization Court found that there was no longer any possibility of an income-based reorganization of the Rock Island, and ordered the Trustee to commence liquidation of the railroad's proper-

ties. Cessation of operations by the Rock Island as a railroad with common carrier responsibilities thus became permanent and complete.

19. As of the date of the Rock Island Act, the Rock Island's obligations as a common carrier had already ceased, and the positions of all but a handful of its former employees had already effectively been eliminated.

20. In its Report to the Reorganization Court Concerning the Proposed Total Abandonment of Rock Island Lines, served May 27, 1980, the defendant Interstate Commerce Commission, the agency charged with administration of the national railway transportation system, recommended that the Court authorize the Trustee "to abandon the entire Rock Island system" and to discontinue service over its lines.

21. On June 2, 1980, after notice and hearing, the Reorganization Court ordered the system-wide abandonment of all Rock Island lines and the discontinuance of all its rail services and obligations as a rail carrier, subject to certain recommendations proposed by the defendant Commission. The Court thus confirmed the prior termination of the common carrier obligation of the Rock Island.

The Rock Island Act

22. The Rock Island Railroad Transition and Employee Assistance Act was signed into law on May 30, 1980. A copy of the Act is attached as Exhibit A to this complaint and incorporated herein.

23. By its terms, the Act becomes effective immediately upon its enactment. It was signed by the President on May 30, 1980.

24. Section 102 of the Act contains a congressional finding that "uninterrupted continuation of services over Rock Island lines is dependent on adequate employee protection provisions", thus stating the purported public purpose of the Act.

25. Section 106 of the Act establishes and creates a new obligation against the estate for "a fair and equitable arrangement with respect to employee protection." This obligation is cumulative with and in addition to employee protection already available to former Rock Island employees under other statutes and agreements.

26. Section 106 requires the railroad and labor organizations representing its employees to enter into a negotiated agreement within 10 days of the enactment of the legislation, which provides "protection for employees who are adversely affected as a result of a reduction in service by such railroad. Such employee protection may include, but need not be limited to, interim employee assistance, moving

expenses, employee relocation incentive compensation, and separation allowances."

27. Section 106(b) requires the imposition of a "fair and equitable" labor protection arrangement by the Interstate Commerce Commission after the 10 day voluntary period has expired. It defines "fair and equitable" as "no less protective of the interests of employees than protection afforded under Section 9 of the Milwaukee Railroad Restructuring Act (45 U.S.C. 908) ["MRRA"]...." This arrangement shall be "imposed" within thirty days of the enactment of the legislation.

28. The employee protective provisions of the MRRA, unlike those in the Rock Island Act, were enacted as part of a statutory plan and in connection with appropriations for the continued operation of core railroad lines.

29. Section 106(e)(2) of the Act provides as follows:

> Benefits and allowances under such agreement or arrangement entered into under this section shall be paid by the Rock Island Railroad from its own assets or in accordance with section 110 of this title, and claims of employees for such benefits and allowances shall be treated as administrative expenses of the estate of the Rock Island Railroad.

Thus, the liabilities created by the Act are administrative expenses of the estate, in preference to certain outstanding claims of creditors and shareholders.

30. Section 110(d) of the Rock Island Act provides that the total liability of the Rock Island under an

employee protection arrangement imposed pursuant to Section 106 "shall not exceed $75,000,000."

31. Section 110 of the Rock Island Act establishes a mechanism by which the Secretary of Transportation "shall guarantee obligations of the Rock Island Railroad" incurred "for purposes of providing employee protection" under Section 106, in a principal amount not to exceed $75,000,000. Under Section 110(b), any obligation guaranteed by the government pursuant to the Act "shall be treated as an administrative expense of the Rock Island Railroad."

32. Section 110(e) of the Act purports to limit the total liability of the United States for obligations incurred by the railroad pursuant to the Act to the guaranteed priority loan under Section 110. Section 110(e) provides as follows:

> Except in connection with obligations guaranteed under this section, the United States shall incur no liability in connection with any employee protection agreement or arrangement entered into under section 106 of this title.

33. In sum, the Rock Island Act creates priority obligations of up to $75,000,000 for new employee protection measures found necessary to meet a public purpose. It imposes upon the estate an involuntary taking or loan in that amount, which is guaranteed by the Secretary of Transportation and which is designated as an administrative expense of the Rock Island estate. That loan would fund an arrangement for payment of labor protection charges imposed

by the Act, whether negotiated by the Trustee under Section 106(a) or imposed by the Interstate Commerce Commission under Section 106(b). The Act provides no mechanism for compensation to the Rock Island estate for obligations incurred under the Act, and purports to eliminate other remedies.

34. Other sections of the Act purport to limit the procedural rights of the Trustee and creditors under the Act.

35. Section 106(c) purports to require the bankruptcy court to authorize and direct the Trustee to implement immediately an arrangement imposed under Section 106(b).

36. Section 106(d)(1) purports to prohibit any stay of an order of the Interstate Commerce Commission or the bankruptcy court which imposes an arrangement under Section 106(b), by the Commission, the bankruptcy court or "any other court".

37. Under Sections 106(b) and (c), the employee protective arrangements which impose the priority obligation under the Act will become effective no later than thirty days after its enactment, with no possibility of a stay.

38. Section 106(d)(2) of the Act purports to limit the right of review of orders implementing Section 106(b). That section provides as follows:

> Any order described in paragraph (1) of this subsection may be appealed only to the court of appeals of the United States having jurisdiction to review decisions and orders of the

> bankruptcy court. Any such appeal to such court of appeals shall be filed within 5 days after the date of entry of the order of the Commission or the bankruptcy court, as the case may be and such court of appeals shall finally determine such appeal within 60 days after the date such appeal is filed. No determination by the court of appeals under this subsection may be reviewed in any other court.

39. The Act imposes additional restrictions on the Trustee in the disposition and use of Rock Island properties.

40. Section 120(a) of the Rock Island Act provides continued directed carrier service without federal government assistance over Rock Island commuter lines which were in operation on March 1, 1980, for a period of two years after the date of the Act. It provides for compensation for the use of Rock Island lines and facilities on terms determined by the Commission to be reasonable. No provision is made for the consent of the Trustee or the approval of the Reorganization Court.

41. Section 120(b) of the Act prohibits the discontinuance of service over a passenger commuter line during the period of directed service.

42. Section 121 provides for "temporary rail banking," by giving the Secretary of Transportation veto power over the scrapping, downgrading or "other disposal" of any line of the Rock Island during the 180 day period following its enactment. However, it provides that the Secretary shall approve the disposition of such lines unless he finds

that there has been a written expression of interest in "purchasing, leasing or rehabilitating the particular rail line or facility for purposes of providing rail service," and that there is a "reasonable expectation that such purchase transaction will be consummated."

43. Section 122 purports to create Commission jurisdiction to authorize "any rail carrier willing to do so voluntarily to use the tracks and facilities of the Rock Island Railroad..." for an indefinite period, under terms of compensation which the Commission finds to be reasonable.

Additional Factual Allegations

44. Since the inception of the reorganization proceedings described in paragraphs 10 through 17 above, the employees of the Rock Island have received five years of labor protection at a cost to the Rock Island estate of almost one billion dollars in wages and benefits and to its creditors in excess of one hundred and fifty million dollars in losses, and at a cost to the federal government in excess of seventy million dollars in directed service subsidies.

45. Employees necessary to the operation of railroad lines over which directed service has been provided by other rail carriers are adequately protected through continued employment by those carriers, and by preferential consideration for other positions on other lines of the interim operating carriers and purchasing carriers. This protection is contractually assured under the terms of a

document known as the "Miami Accords," which was executed on March 4, 1980, by the representatives of labor organizations representing former Rock Island employees and interim and directed service carriers.

46. Employees not protected under the Miami Accords are adequately protected under existing statutory provisions, which include the Railway Unemployment Insurance Act, 45 U.S.C. § 351 et seq. and the Railway Retirement Act of 1974, 45 U.S.C. § 231 et seq. These statutes provide unemployment compensation and other employment protection benefits at a higher level and for longer duration than are available to ordinary workers under most state unemployment insurance plans.

47. The Rock Island Railroad has contributed to funds available for employee protection under these and other statutory plans. See 45 U.S.C. §358. At no time were these contributions to existing statutory employment protection accounts withheld or deferred, so long as the Rock Island's common carrier obligations remained in existence. At no time have benefits otherwise payable under these statutes been withheld or deferred.

48. In addition to existing statutory employment protection, former Rock Island employees may be protected under a variety of union and private contractual labor protection programs.

49. The former employees of the Rock Island are thus protected without the additional protection made available to them under the Rock Island Act.

50. In its Report to the Reorganization Court Concerning the Proposed Total Abandonment of Rock Island Lines, served May 27, 1980, the defendant Interstate Commerce Commission recommended complete abandonment of Rock Island lines. However, it did not recommend the imposition of any labor protection conditions in connection with its approval of total line abandonment. Rather, the Commission specifically declined to recommend the imposition of employee protective conditions equal to or greater than those provided in New York Dock Railway Control--Brooklyn Eastern District, 360 I.C.C. 60 (1970). The Commission pointed out its past practice of refusal to order the imposition of employee protective conditions in entire rail system abandonments.

51. On June 2, 1980, the Reorganization Court ordered the system-wide abandonment of all Rock Island lines. However, the Court found that the imposition of labor protective conditions in connection with the system-wide abandonment was unwarranted under existing law, on the basis of case precedent, and the constitutional and equitable rights of the parties, and specifically directed the Trustee not to pay any employee labor protection or to borrow for that purpose.

52. During the period of reorganization, dividend payments and redemption of the creditors' interests in outstanding Rock Island securities have been suspended and deferred.

53. As of the present date, the assets of the Rock Island, with the imposition of labor protection claims contemplated by the Act, would be clearly insufficient to meet its debt and equity obligations.

54. The employee protection provisions of the Rock Island Act and the other limitations on the disposition of the assets of the Rock Island estate imposed by the Act, confer no benefit upon the Rock Island estate or its creditors, and relieve them of no existing obligation.

55. The imposition of further labor protection costs as an administrative expense against the assets of the estate would result in further impairment of the debt and equity rights of the plaintiff creditors and shareholders.

Count I
(Unconstitutional Taking and Due Process)

56. Plaintiffs reallege and incorporate paragraphs 1 through 55 as paragraph 56 of Count I of this complaint.

57. In this Count, the plaintiffs seek a declaratory judgment, as provided in the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, that the Rock Island Act is unconstitutional, because it violates the prohibition contained in the Fifth Amendment to the United States Constitution

against uncompensated takings of private property for public use, and deprives the plaintiffs of their property without due process of law.

58. An actual controversy which is justiciable in character exists between the plaintiffs and the defendants, as to whether the defendants Interstate Commerce Commission and the Secretary of Transportation may impose prior obligations for the cost of labor protection up to the amount of $75,000,000 upon the Rock Island estate, as set forth in paragraphs 22 through 33 of this Complaint, consistent with the Fifth Amendment's prohibition against uncompensated takings of private property for public use.

59. The imposition of the obligations and debt provided under the Act would impair the plaintiffs' rights and security in the assets of the Rock Island estate, and impose upon the Trustee duties which conflict with his existing responsibility to preserve the assets of the estate.

60. A declaratory judgment as to the constitutionality of the Act's provisions would resolve the controversy between the parties as to the authority of the Commission and the Secretary to impose new costs of labor protection as provided in the Act.

Count II
(Unconstitutional Taking, Due Process and Equal Protection)

61. The plaintiffs reallege and incorporate paragraphs 1 through 55 as paragraph 61 of Count II.

62. This Count alleges an unconstitutional taking of the property of the Rock Island estate and violation of the plaintiffs' due process and equal protection rights in section 110(e) of the Act, which is described and set forth in paragraph 28. That section purports to specifically limit the liability of the United States to the loan guarantees provided for in section 110. It thereby purports to eliminate the remedy otherwise available for claims against the United States under the Tucker Act, 28 U.S.C. § 1491 et seq. The elimination of this right would destroy the plaintiffs' ability to seek compensation for the taking of their property for public use, as set forth in Count I above, and thereby further violate their equal protection and due process rights.

63. By imposing a borrowing obligation of $75 million and related administrative expense upon the assets of the Rock Island estate without conferring any benefit upon the estate or providing any mechanism for compensation to the estate, the Act violates the constitutionally protected property rights of creditors and constitutes a further unconstitutional taking.

64. The plaintiffs seek a further declaration as provided in 28 U.S.C. § 2201, that Section 110(e) of the Rock Island Act, read in light of its other provisions, is unconstitutional under the Fifth and Fourteenth Amendments to the United States Constitution.

Count III
(Unconstitutional Taking)

65. Plaintiffs reallege and incorporate paragraphs 1 through 55 as paragraph 65 of Count III of this complaint.

66. In this Count, the plaintiffs seek a further declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202, as to the constitutionality of the provisions of the Act which purport to limit their remedies and rights of review under the Act.

67. In this Count, the Plaintiffs seek a further declaratory judgment under 28 U.S.C. §§ 2201 and 2202. Specifically, and in light of the findings of cashlessness, impossibility of reorganization and entitlement to abandonment by the Reorganization Court and the Commission, as set forth in paragraphs 14, and 18 through 21, supra, the plaintiffs urge that the Act's provisions which permit continued operation over the Rock Island's lines by other carriers, without the consent or approval of the Trustee and without regard to the rights of creditors, and which otherwise limit the Trustee's right to dispose of the railroad's property, constitute an unconstitutional uncompensated taking of the railroad's property for public purposes, and a deprivation of the property of the Rock Island estate without due process of law.

Count IV
(Due Process and Equal Protection)

68. Plaintiffs reallege and incorporate paragraphs 1 through 55 as paragraph 68 of Count IV of this complaint.

69. Specifically, the plaintiffs maintain that the provisions described in paragraphs 26 through 37 which require the automatic implementation of an employee protection plan imposed by the Interstate Commerce Commission under section 106(b) of the Act within thirty days, combined with the prohibition of a stay of the Commission's order by the Commission, the bankruptcy court, or any other court, makes a violation of the plaintiff's procedural due process and equal protection rights unavoidable because of the unreasonably short time period established for final, unstayable action affecting the property of the estate.

70. The plaintiffs further maintain that the provision described in paragraph 38, supra, which purports to eliminate judicial review of orders of the Commission or bankruptcy court under section 106(b) except for appeals taken within five days to the court of appeals having jurisdiction to review orders of the bankruptcy court, violates their right to due process and equal protection of the laws, under the Fifth and Fourteenth Amendments, in that it deprives them of judicial review of constitutional issues which is available to other citizens. No adequate justification exists for this arbitrary discrimination.

Count V
(Separation of Powers and Equal Protection)

71. The plaintiffs reallege and incorporate paragraphs 1 through 55, supra, as paragraph 71 of Count V of their complaint.

72. The provision described in paragraph 38, supra, infringes the concept of separation of powers upon which the Constitution is based, in that it purports to deprive the Supreme Court of power to decide the constitutionality of Congressional action.

73. The provision described in paragraph 38, supra, which purports to deprive the Supreme Court of jurisdiction to review the constitutionality of the Act, further deprives the plaintiffs of due process and equal protection of the laws, because it would deprive them of judicial review which is available to others. See 28 U.S.C. §2284.

74. The provision described in paragraph 35, supra, which purports to require this Court to enforce an order of the Interstate Commerce Commission, no matter how unreasonable or constitutionally deficient, and to deprive this Court of the power to review or reconsider that order, violates the constitutional principle of separation of powers, in that it purports to deprive this Court or any court of inherently judicial powers, by transferring the jurisdiction to determine whether a debt should be imposed upon a debtor's estate to an administrative agency, and by

infringing upon the Reorganization Court's judicial discretion and full jurisdiction over a pending proceeding. This defect is aggravated by the prohibition of judicial stay of any Commission order which is contained in the Act, as described in paragraph 37, supra.

75. The plaintiffs seek a further declaratory judgment, under 28 U.S.C. §§ 2201 and 2202 that the provisions described in this Count violate the constitutional principles of separation of powers and equal protection as herein stated.

Count VI
(Enactment of a Bankruptcy Law That is Not Uniform)

76. The plaintiffs reallege and incorporate paragraphs 1 through 55 as paragraph 76 of Count VI of this Complaint.

77. Article I, section 8 of the Constitution provides that Congress shall have the power "[t]o establish . . . uniform Laws on the subject of Bankruptcy throughout the United States."

78. Sections 106 and 110 of the Rock Island Act, as described in paragraphs 25 through 38, supra, violate the requirement of Article I, section 8, that laws concerning bankruptcy must be uniform, and the plaintiffs' right to

equal protection of the laws, by imposing labor protection obligations and debts as an administrative expense upon the estate of the Rock Island, which are higher than and different from those imposed on other bankrupt estates.

79. The plaintiffs seek a further declaration by this Court, under 28 U.S.C. §§ 2201 and 2202, that the provisions of the Rock Island Act described in this Count violate the requirement of Article I, section 8 of the Constitution, that laws in bankruptcy must be uniform.

Count VII
(Injunctive Relief)

80. The plaintiffs reallege and incorporate paragraphs 1 through 79 as paragraph 80 of Count VII.

81. This Count seeks temporary and permanent injunctive relief which is necessary to enforce declaratory judgments as to the issues set forth in Counts I through III, as provided under 28 U.S.C. § 2202. Specifically, the plaintiffs request the Court to enjoin the defendant Interstate Commerce Commission from imposing labor protection obligations, and the defendant Secretary of Transportation from imposing or guaranteeing any loans, pursuant to the Rock Island Act, until final determination of the Act's constitutionality.

82. Injunctive relief is necessary to prevent immediate and irreparable harm to the plaintiff's property and constitutional rights. Specifically, under section 106 of the Act, as set forth in paragraphs 33 through 38, supra,

if the labor organization representatives and the Trustee are unable to agree on labor protection terms within ten days of the Act's enactment, the I.C.C. "shall impose" labor protection obligations of up to $75,000,000 on the estate as an administrative expense, within thirty days of its enactment. Section 110 of the Act further provides that payment of obligations imposed by the Commission under the Act would be funded by a priority loan guaranteed by the Secretary of Transportation.

83. If the defendants Commission and Secretary are not enjoined from imposing labor protection orders, charges and administrative expenses upon the estate pursuant to the Act, labor protection obligations and charges will be imposed upon the Rock Island estate within thirty days of the enactment of the Act. As described in paragraph 36 of this Complaint, an order of the defendant Commission imposing such obligations, or an order of the bankruptcy court implementing such an order, may not be stayed in any court.

84. Implementation of such an order would cause plaintiffs injury, in that it would be a taking of the property of the Rock Island estate without just compensation, in violation of their Fifth Amendment rights.

85. The imposition of such an obligation or order would cause the plaintiffs further irreparable injury in that the monies paid under it would be paid to individual

employees and would be recoverable only by a multiplicity of lawsuits, if at all.

86. The harm imposed by the Act would further be irreparable because the Act purports to limit the liability of the United States to the administrative expense loan imposed by the statute, as described in paragraph 32, supra. An order of the Commission imposing labor protection obligations would thus become effective immediately upon its issuance, which could occur as of June 9, 1980, and under the terms of the Act no stay of such an order could then be issued by any Court. The harm suffered by the plaintiffs due to a Commission order would thus be irreparable upon issuance of the order, because the plaintiffs' right to review prior to its implementation is severely limited under the statute.

Prayer For Relief

Wherefore, the plaintiffs, William Gibbons, First National Bank, Continental Bank, and Henry Crown, et al., respectfully pray that this Court grant them relief as follows:

A. Declare the Rock Island Transition and Employee Assistance Act to be unlawful and unconstitutional on the ground that it violates the Fifth Amendment of the United States Constitution because it mandates an unconstitutional taking of the property of the Rock Island estate for public purposes without just compensation.

B. Declare the Rock Island Employee Assistance Act unconstitutional insofar as it violates the due process clause of the Fifth Amendment and the equal protection provisions of the Fifth and Fourteenth Amendments, and the Constitutional doctrine of separation of powers.

C. Issue a preliminary and permanent injunction, enjoining the defendant I.C.C. from entering an order under the authority granted to it by the Act, imposing labor protection on the estate of the Rock Island, and enjoining the defendant and Secretary of Transporation from imposing a loan to fund any labor protection provision under the Act.

D. Award plaintiffs their costs and attorneys fees.

E. Grant such further relief as the Court deems just and appropriate.

Respectfully submitted,

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Attorney for William M. Gibbons
Trustee of Chicago, Rock Island & Pacific Railroad Company

By _____
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By _____
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June 5, 1980.

APPENDIX E

AFFIDAVIT OF WILLIAM M. GIBBONS

June 5, 1980

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In the Matter of CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, Debtor, WILLIAM M. GIBBONS, as Trustee of the Chicago, Rock Island and Pacific Railroad Company, Debtor; CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as Indenture Trustee; THE FIRST NATIONAL BANK OF CHICAGO, as Indenture Trustee; and HENRY CROWN, et al., Plaintiffs, v. THE UNITED STATES OF AMERICA; THE INTERSTATE COMMERCE COMMISSION; and NEIL GOLDSCHMIDT, United States Secretary of Transportation, Defendants.	In Proceedings for the Reorganization of a Railroad No. 75 B 2697

AFFIDAVIT OF
WILLIAM M. GIBBONS, TRUSTEE

This Affidavit is submitted in support of the Trustee's Motion for a Temporary Restraining Order against implementation of the Rock Island Act pending resolution of the constitutional questions raised in the Complaint filed as of this date. In support thereof, the affiant states as follows:

1. I, William M. Gibbons, am Trustee of the Chicago, Rock Island and Pacific Railroad Company, Debtor, pursuant to an Order of this Court of March 28, 1975.

2. As Trustee, pursuant to the Order of this Court and Section 77 of the Bankruptcy Act, it is my fiduciary duty to preserve the assets of the estate for the benefit of its creditors.

3. Under an Order of this Court of January 25, 1980, it is my responsibility to proceed with the liquidation of this estate.

4. Under the Order of this Court of June 3, 1980, it is my responsibility to effect the abandonment of lines and discontinuance of service by the Rock Island Railroad. In connection therewith, this Court has prohibited me from entering into any agreements or obligations imposing labor protection costs on the estate.

5. Under Section 106 of the Rock Island Transition and Employee Assistance Act, which was signed into law on Friday, May 30, 1980, I may enter into a labor protection agreement with representatives of labor organizations which represent the former employees of the Rock Island.

6. If I do not enter into a voluntary agreement on behalf of the estate with labor representatives within 10 days of the Act's enactment - that

is, by Monday, June 9, 1980 - I will become subject to an order of the defendant Interstate Commerce Commission (the "Commission") to implement a labor protection arrangement imposed by the Commission.

7. Any involuntary arrangement imposed by the defendant Commission concerning labor protection under the Act will become an administrative expense against the assets of the estate. Under the terms of the Act, the cost of such an arrangement may amount to $75,000,000.

8. The $75,000,000 cost of the labor protection arrangement which may be imposed by the Commission will be imposed on the estate through an involuntary taking or loan guaranteed by the federal government which will be an administrative expense against the assets of the estate.

9. Under Section 106(b) of the Act, the defendant Commission will have jurisdiction to impose the labor protection arrangement commencing Monday, June 9, 1980.

10. The duties mandated of me by the Act to implement the labor protection arrangement imposed by the Defendant Commission directly conflict with my duties to preserve and liquidate the assets of the estate for the highest and best values obtainable and will dilute the value of those assets available for the creditors and shareholders.

11. The Act further provides that this Court shall order me to implement an Interstate Commerce Commission arrangement without review of that arrangement by this Court. Under the Act, there may be no stay of a labor protection arrangement imposed by the Interstate Commerce Commission by this or any other Court. The costs of the labor protection arrangement imposed by the Interstate Commerce Commission would have administrative expense status and would not be subject to judicial review prior to implementation. The Interstate Commerce Commission jurisdiction and the imposition by the Commission of a labor protection arrangement under the Act would thus result in irreparable injury to the estate.

12. The estate would also suffer irreparable injury by the implementation of a labor protection arrangement under the Act because the payments required would be to numerous individuals and would be recoverable only through numerous lawsuits if at all.

13. I have read the Complaint for Declaratory Relief and a Preliminary Injunction which was filed on this date in these proceedings, and state that the allegations as to the matters contained therein are

true and complete to the best of my knowledge, information and belief.

Further affiant sayeth not,

WILLIAM M. GIBBONS, Trustee
Chicago, Rock Island and
Pacific Railroad Company,
Debtor

SUBSCRIBED AND SWORN to
before me this 5th day
of June, 1980.

Notary Public

APPENDIX F

BRIEF OF THE APPELLEES, THE TRUSTEE AND CREDITORS OF THE CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY

IN RE CHICAGO, R.I. & P. R.R.

NOS. 80-2487 and 80-2636 (7th Cir.)

November 10, 1980

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 80-2487 and 80-2536

In the Matter of: CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, Debtor.	Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
Appeals of: RAILWAY LABOR EXECUTIVES' ASSOCIATION; THE UNITED STATES OF AMERICA; THE INTERSTATE COMMERCE COMMISSION; and NEIL GOLDSCHMIDT, United States Secretary of Transportation, Defendants-Appellants.	No. 75 B 2697 Hon. Frank J. McGarr, Judge

---

BRIEF OF THE APPELLEES, THE TRUSTEE AND CREDITORS OF THE CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY

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DATED: November 10, 1980

CERTIFICATE OF INTEREST

The undersigned, counsel of record for WILLIAM M. GIBBONS, Trustee of the Chicago, Rock Island and Pacific Railroad Company, Debtor, furnishes the following list in compliance with Circuit Rule 5(b):

1. Undersigned attorney of the law firm of Williams, Manos, Rutstein, Goldfarb & Sharp, Ltd., represents William M. Gibbons, as Trustee, in the above-captioned proceeding and has represented Mr. Gibbons in the District Court throughout the reorganization proceedings.

2. Not applicable.

3. The law firm of Malato, Stein & Grossman has appeared in the District Court as special counsel for William M. Gibbons in a matter not related to the above-captioned Appeal.

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NICHOLAS G. MANOS
Attorney for William M. Gibbons, Trustee of the Chicago, Rock Island and Pacific Railroad Company, Debtor.

CERTIFICATE OF INTEREST

The undersigned counsel of record for Henry Crown, et al., plaintiffs-appellees, furnish the following list in compliance with Circuit Rule 5(b). Henry Crown, et al. include the following individuals and corporations:

H.N. Wyatt, as Trustee under Trust Agreement dated July 11, 1963

H.N. Wyatt, as Trustee under Trust Agreement dated July 22, 1963

H. N. Wyatt, as Trustee under Trust Agreement dated December 2, 1964

Florence C. Rothman, Irving Crown, and Irving Crown, Executor under the ast Will of Edward Crown, as Trustee under Trust Agreement dated May 29, 1962

Henry Crown

Gladys K. Crown

Henry Crown & Company, Not Incorporated

Areljay Company, Not Incorporated

Irving Crown

The Crown Fund, an Illinois partnership

Arie & Ida Crown Memorial, an Illinois not-for-profit corporation

Irving Crown, Lester Crown, Henry Crown, Milton Falkoff and Arnold Sobel, as Trustees under Trust Agreement dated October 1, 1965

Evelyn Green

Daniel R. Murray

November 10, 1980

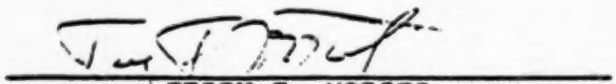
CERTIFICATE OF INTEREST

The undersigned, counsel for THE FIRST NATIONAL BANK OF CHICAGO, as Indenture Trustee, furnishes the following list in compliance with Circuit Rule 5(b):

1. The First National Bank of Chicago, as Indenture Trustee, is the only party represented by us in this Appeal.

2. Not applicable.

3. The law firm of Rudnick and Wolfe currently represents The First National Bank of Chicago, as Indenture Trustee. During the period from March 1975 through August 1979 The First National Bank of Chicago was represented by Isham, Lincoln & Beale.



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CERTIFICATE OF INTEREST

The undersigned, counsel of record for Continental Illinois National Bank and Trust Company of Chicago, as Indenture Trustee, furnishes the following list in compliance with Circuit Rule 5(b):

(1) Undersigned attorneys solely represent Continental Illinois National Bank and Trust Company of Chicago ("CINB"), as Indenture Trustee, in this appeal proceeding (Docket Nos. 80-2487 and 80-2536).

(2) CINB is a National Banking Association. Its parent corporation is Continental Illinois Corporation.

(3) Mayer, Brown & Platt has served as sole counsel for CINB, as Indenture Trustee, through its Corporate Trust Division, throughout the railroad reorganization proceedings entitled "In the Matter of the Chicago, Rock Island and Pacific Railroad Company, Debtor" in the United States District Court for the Northern District of Illinois, Eastern Division, Docket No. 75 B 2697. CINB's Commercial Banking Division has at times been represented by Schwartz, Cooper, Kolb & Gaynor, Chtd., 33 North LaSalle Street, Chicago, Illinois 60602. CINB's Commercial Banking Division is not a party to this appeal proceeding.

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Harold L. Kaplan
One of the Attorneys for
Continental Illinois National
Bank and Trust Company of Chicago,
as Indenture Trustee

DATED: November 10, 1980

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Nos. 80-2487 and 80-2536

In the Matter of: CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, Debtor. Appeals of: RAILWAY LABOR EXECUTIVES' ASSOCIATION; THE UNITED STATES OF AMERICA; THE INTERSTATE COMMERCE COMMISSION; and NEIL GOLDSCHMIDT, United States Secretary of Transportation, Defendants-Appellants.	Appeals from the United States District Court for the Northern District of Illinois, Eastern Division. No. 75 B 2697 Hon. Frank J. McGarr, Judge

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BRIEF OF THE APPELLEES, THE TRUSTEE AND CREDITORS OF THE CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY

This brief is submitted by Appellees William M. Gibbons, Trustee of the Chicago, Rock Island and Pacific Railroad Company, Debtor ("Trustee"), Continental Illinois National Bank and Trust Company of Chicago and The First National Bank of Chicago, as Indenture Trustees, and Henry Crown, et al., substantial holders of first mortgage bonds, income debentures and common stock of the Chicago, Rock Island and Pacific Railroad Company ("creditors and shareholders").

ISSUES PRESENTED

This appeal from Judge McGarr's denial of the Appellants' Motions to Vacate on October 15, 1980, presents only one issue for review:

> Does the addition of the new Section 124(c) of the Rock Island Act which states that '[n]othing in this Act ... shall limit the right of any person to commence an action ... under ... the Tucker Act', or any other amendment to the Rock Island Act, correct the Act's unconstitutionality under the due process and governmental taking provisions of the Fifth Amendment to the United States Constitution?

Addtional issues raised with regard to Judge McGarr's June 9, 1980 injunction, which are already before the United States Supreme Court, are as follows:

> (1) Do the Rock Island Act's employee protection provisions violate the fifth amendment to the United States Constitution through their uncompensated taking of the private property of the Rock Island estate for a purported public purpose and without due process of law?
>
> (2) Does the Rock Island Act's employee protection scheme violate the due process, separation of powers and uniformity in bankruptcy provisions of the United States Constitution by its summary taking of the estate's property?

---

*/ The Trustee, creditors and shareholders intend to submit a separate memorandum in response to the stay motion filed by the Appellant RLEA on November 7, 1980. That memorandum will address the question, not addressed in this brief, whether Judge McGarr properly exercised his discretion by enjoining the implementation of the Rock Island Act to prevent the immediate and irreparable harm which the Act's implementation would impose on the estate.

NATURE OF THE CASE

This case involves a second attempt by Congress to impose the $75,000,000 cost of a newly created labor protection scheme on the Rock Island estate. The first attempt, the Rock Island Railroad Transition and Employee Assistance Act, Pub. L. No. 96-254, 45 U.S.C. § 1001, et seq. (the "Rock Island Act"), was declared unconstitutional by Judge Frank J. McGarr, who enjoined its implementation and enforcement. The Railway Labor Executives' Association subsequently sought a stay of Judge McGarr's order from Justice Stevens. That request was denied first by Justice Stevens, and thereafter by the full Supreme Court. Railway Labor Executives' Association v. Gibbons, 100 S. Ct. 2668 (Stevens, Circuit Justice, June 28, 1980,); 100 S. Ct. 3057 (July 2, 1980), appeal docketed (U.S. S. Ct. September 15, 1980).

Displeased with the judicial determination of the unconstitutionality of its labor protection scheme, Congress reenacted the same scheme with minor modifications as part of the Staggers Rail Act of 1980, Pub. L. No. 96-448 (October 14, 1980), § 701 et seq. (the "Staggers Rail Act"). Finding the modifications to the Rock Island Act made by the Staggers Rail Act to be purely cosmetic, Judge McGarr refused to vacate his preliminary injunction. This appeal arises from that order.

JURISDICTIONAL SUMMARY

The Trustee, creditors and shareholders respectfully submit that this Court should decline to consider these appeals because, an appeal of Judge McGarr's June 9, 1980 Order having been taken to the United States Supreme Court under 28 U.S.C. § 1252, all subsequent appeals from that Order are already before the United States Supreme Court. The position of the Trustee, creditors and shareholders as to this Court's jurisdiction over these appeals is explained in their Motion to Dismiss or Certify now pending before this Court. However, should this Court determine that it will hear these appeals, the law of this case remains that the Rock Island Act employee protection scheme is fundamentally unconstitutional. Thus, the only issues which this Court may properly review concern the propriety of Judge McGarr's October 15, 1980 ruling that the procedural changes made by the Staggers Rail Act amendments are merely "cosmetic".*/

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*/ The issues raised by the October 15 Order by which Judge McGarr addressed the Appellants' arguments as to the effect of the Staggers Rail Act Amendments are addressed in Part II of this Brief. Although it seems clear that this Court should not reexamine Judge McGarr's initial determination as to the basic constitutional faults of the Rock Island Act scheme, the Trustee, creditors and shareholders have addressed issues concerning the June 9 Order in Part I of this brief.

Rock Island lines for the ensuing five years despite the repeated objections of the creditors and shareholders. Although the estate incurred devastating losses, the Trustee and Reorganization Court sought to serve the public interest in continued rail operations through an income-based reorganization. The Trustee pursued the prospect of achieving an income-based reorganization by seeking, albeit unsuccessfully, federal loan assistance for rehabilitation of track and rolling stock and more efficient work rules agreements with labor organizations representing Rock Island employees.

Since 1965 the Rock Island has sustained losses of over $280 million -- more than a quarter of a billion dollars.*/ In 1978, after year-end financial adjustments, the Rock Island lost $21.2 million on an ICC accounting basis and $17.9 million on the Trustee's own depreciation accounting basis. During the first nine months of 1979 the Rock Island lost a staggering $66.2 million on an ICC accounting basis

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[Footnote continued from preceding page.]

References to the Appendix of the Trustee and Creditors, filed herewith, hereinafter appear as "Tr. App."; references to the Short Appendix To Brief for Appellant Railway Labor Executives' Association, filed October 27, 1980, as "RLEA App."; references to Appendix to the Brief for Appellant United States of America, filed October 28, 1980, as "Govt. App."; and references to the Appendix to the Brief for the Interstate Commerce Commision, filed October 28, 1980, as "ICC App."

*/ Response of the Intervenors' Crown et al. To Trustee's Report for 1978 and Four Months 1979, at pp. 26-34 (September 6, 1978) (Tr. App. B-30-38); Income Statements, 1975-79 (Tr. App. A-1-15).

and $67.7 million on the Trustee's depreciation accounting basis. Through September 1979, accumulated losses during the reorganization years exceeded $178.4 million on an ICC accounting basis basis and $148.3 million on a depreciation accounting basis. These losses were accompanied by accelerating erosion of the Trustee's cash reserves. By the summer of 1979, these reserves had dwindled to a point at which the Trustee could no longer pay his operating expenses.*/

These large losses suffered by the Rock Island estate, its creditors and shareholders enabled the employees of the Rock Island to continue their employment with the Rock Island for almost five years after the filing of the reorganization petition at a cost to the estate of almost one billion dollars in wages and benefits.**/

B. The Strike

Despite the Trustee's dire financial straits, on August 28, 1979, the Brotherhood of Railway and Airline

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*/ Response of Intervenors' Crown et al. To Trustee's Report for 1978 and Four Months 1979, at pp. 52-55 (Tr. App. B-56-59); ICC Directed Service Order No. 1398, Appendix A (Tr. App. C-45).

**/ Complaint for Declaratory Judgment and Injunctive Relief, at p. 6, para. 12 (June 5, 1980) Affidavit of William M. Gibbons, Trustee, at pp. 4-5, para. 13 (June 5, 1980) (Govt. App. Document No. 9).

Clerks ("BRAC") and the United Transportation Union ("UTU") (represented in these proceedings by the Appellant RLEA) struck the Rock Island. The strike had its genesis in the efforts of the Trustee to obtain his employees' agreement to work rules changes that would result in substantial productivity savings for the Rock Island.*/ The Trustee's efforts to eliminate antiquated, highly inefficient work rules with which rail labor has plagued the entire rail industry for decades were critical to the success of his productivity improvement program and his efforts to achieve an income-based reorganization.

As early as April of 1977, the Trustee advised BRAC and other unions representing Rock Island employees that he would not grant the National Railway Labor Conference his power of attorney to negotiate wages and work rules on a national basis along with other railroads throughout the country. Rather, he would conduct his own separate

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*/ The Rock Island had long suffered from an abnormally high operating ratio -- the ratio of a railroad's operating expenses to its total operating revenues -- a key measure of the efficiency with which a railroad conducts its operations. The Rock Island reported an operating ratio exceeding 80% in all but one year of the decade preceding reorganization. At the outset of these proceedings, the Trustee projected that operating ratios would move to a markedly more efficient level of approximately 75% for each of the years 1976 through 1980. Brief of Intervenors-Appellants Crown, et al., at 37-42, In re Chicago, R.I. & P.R.R., 545 F.2d 1087 (1976). In the first three years of reorganization, 1975-1977, the operating ratio averaged an inefficient 86.6%. The operating ratio subsequently surpassed 100%, reflecting in part the Trustee's inability to secure agreement for meaningful work rules changes. Income Statements, 1975-79 (Tr. App. A-1-15).

negotiations in order to obtain substantial changes of work rules which inhibited his ability to operate the Rock Island's rail system efficiently. The Rock Island Trustee took the position that he would not agree to wage increases for employees represented by BRAC, or any other union, unless and until more efficient work rules were agreed upon and implemented. The Trustee's position was necessarily firm because the financial position of the Rock Island was so precarious that wage increases of the magnitude sought by BRAC and the other unions could be funded only out of productivity savings achieved by overhauling antiquated rail labor work rules.*/

Five unions representing Rock Island employees reached agreement with the Trustee in 1977. Because more efficient work rules accepted by these unions took effect on or prior to January 1, 1978, the Trustee agreed to pay wage scales agreed to by the National Railway Labor Conference beginning January 1, 1978. These wage increases would be funded by cost savings effected by the more efficient work rules. Seven other unions representing Rock Island employees settled with the Trustee after the effective date of the new nationally negotiated wage scale. In each case the national wage scale became effective on the first day of the month in which agreement was reached. Thus, in each instance the new

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*/ Report of Emergency Board No. 191, at pp. 2-7 (October 22, 1979) (RLEA App. 87, 90-95).

wage scale took effect concurrently with the implementation of more efficient work rules.*/

Despite the fact that every other union representing Rock Island employees agreed to work rules changes that would take effect concurrently with and thus fund nationally negotiated wage increases, the two largest unions, BRAC and UTU adamantly refused to agree to any work rules changes unless their members received wage increases retroactive to January 1, 1978. In the words of the Emergency Board subsequently appointed by the President to study this dispute:

> BRAC rejected the Rock Island's arguments primarily on the ground that retroactive wage adjustments are a traditional and expected part of collective bargaining in the railroad industry.

Report of Emergency Board No. 191, at page 9 (RLEA App. 97) (emphasis added).**/

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*/ Id. at 7-9 (RLEA App. 95-97).

**/ Other issues, generally involving BRAC's refusal to agree to more efficient work rules sought by the Trustee, also divided BRAC and the Trustee. BRAC expressed concern that the Trustee's efforts to eliminate widespread featherbedding would lead to a significant reduction in the number of BRAC-represented employees. UTU took positions similar to those maintained by BRAC. Ibid., at 10-12 (RLEA App. 98-100). However, UTU proved to be slightly more moderate than BRAC. Shortly before the strike, UTU reached an interim agreement with the Rock Island Trustee under the auspices of the National Mediation Board. Despite this apparent progress, BRAC initiated its strike against the Rock Island one day after a Special Board of Inquiry agreed to by the Trustee and UTU issued its report. Ibid., at 3-5 (RLEA App. 91-93).

By June 30, 1979, shortly before BRAC and UTU struck the Rock Island, the cash and short-term investments of the Rock Island had declined to a mere $3.0 million from a level consistently above $16 million in prior reorganization years.*/ Even more ominously, the Trustee reported a rapidly growing net working capital deficit that totalled $52.2 million on June 30, 1979.**/ The Trustee estimated

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*/ The Trustee publicly reported cash and short-term investments as follows:

Date	Amount (in millions)
March 17, 1975	6.8
December 31, 1975	20.8
December 31, 1976	19.6
December 31, 1977	16.4
December 31, 1978	16.6
June 30, 1979	3.0

Response of Intervenors Crown et al. To Trustee's Report for 1978 and Four Months 1979, at p. 54 (September 6, 1979) (Tr. App.B-58). These figures were filed regularly with the reorganization court and were well-known to BRAC and UTU.

**/ Id. at 50 (Tr. App. B-54). The following figures were publicly reported, and thus known by BRAC and UTC:

	Net Working Capital (Deficit) (millions)
March 16, 1975	20.2
December 31, 1975	16.6
December 31, 1976	7.8
December 31, 1977	(9.7)
December 31, 1978	(26.2)
June 30, 1979	(52.2)

Net working capital is the difference between short-term assets and short-term liabilities. The Trustee offered to open his books to examination by auditors selected by RLEA and UTU to confirm this bleak state of affairs, but this invitation was never accepted.

that the total cost of the retroactive pay sought by BRAC and UTU would approximate $14 million.*/ In light of the estate's rapidly declining cash position, it was abundantly clear that the Trustee did not have $14 million to pay out for any purpose.

Despite this dismal state of affairs, BRAC refused to agree to more efficient work rules and to eliminate costly featherbedding practices. On August 28, 1979, BRAC struck the Rock Island. One day later, UTU also struck the Rock Island. Because the Trustee could not carry on operations with a partial work force and sought an orderly shutdown of operations, he issued notices of discharge or suspension to his contract employees in accordance with his collective bargaining agreements.

On September 20, 1979, the President of the United States appointed an Emergency Board pursuant to Section 10 of the Railway Labor Act, 45 U.S.C. § 151, et seq., thereby

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*/ Id. at 9 (RLEA App. 97). The other unions representing Rock Island employees insisted upon including in the agreements they reached with the Trustee a so-called "most-favored nation" clause -- i.e., if the Trustee granted retroactive pay to any union, he must grant it to all unions. Thus the retroactivity sought by BRAC and UTU would be extended to all employees of the Rock Island -- a fact well known to BRAC and UTU. Id.

mandating a return to work by the Rock Island employees.*/ The next day, in the presence of counsel for BRAC and UTU, Judge McGarr analyzed the situation resulting from the Presidential order:

> The problem we have with it now is that presumably by Presidential Order the strike is over and everybody is supposed to go back to work. It is unfortunate that the Unions are playing 'dog in the manger' and pretending they don't know about this and that they are not going to acknowledge it until they are served and so forth. Sooner or later I suppose somebody is going to read the order and they are going to have to catch them and they are going to have to comply with it, and I can make no assumption other than that they will comply with it. However unhappy they may be with it I am sure the Unions like everybody else are going to obey a Presidential Order and I would hope and expect that they would sit down immediately and that they would discuss with the Rock Island the mechanics for getting them back to work and getting the Railroad running again. Any other result would surprise me.

Transcript of Proceedings, September 21, 1979, at 21; see also id. at 11.

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*/ Report of Emergency Board No. 191 (RLEA App. 87). On September 21, 1980, the Trustee sent a telegram to Fred Kroll, President of BRAC, and to A. H. Chesser, President of UTU, indicating the Trustee's intention to comply with the Presidential back-to-work order and inviting their compliance. UTU President Chesser responded by telegram on September 21, 1979:

> Upon receipt of official notification of President Carter's Executive Order and appointment of an emergency board we will advise you of the UTU return to work arrangements.

Transcript of Proceedings, September 21, 1979, at 9-10. BRAC did not respond. Id.

Contrary to Judge McGarr's expectations, the unions never ordered their members to return to work until the initiation of directed service. The United States made no attempt to enforce the President's order. Either the Government never served the union leaders with notice of the Presidential Order, which is unlikely indeed, or the unions simply chose to defy the law.

C. Cashlessness and Directed Service

The strike ran its predictable course. Though a management team attempted to carry on limited service, the Rock Island effectively ceased operations. The very limited cash reserves of the Rock Island were quickly exhausted. On September 26, 1979, the Commission ordered the Kansas City Terminal Railway Co. to operate and provide directed service over the lines of the Rock Island, based upon "the specific finding that [the Rock Island's] cash position makes its continuing operation impossible," and that the Rock Island "suffers from the type of 'cashlessness' described in 49 U.S.C. § 11125(a)(1)." Directed Service Order No. 1398, 44 Fed. Reg. 56,343 (1979) (Tr. App. C-1). Even with the implementation of directed service by the Commission, however, the Rock Island workers represented by BRAC refused to return to work until the Commission agreed that their entire membership would be employed in directed service

operations, regardless of need and no matter how great the resulting increase in the cost of directed service.*/ As a result of the Commission's directed service orders, the employment of most Rock Island workers was extended for an additional six months, at a cost to the Government of over $70 million.**/

Since the date of the initial directed service order, the Rock Island has had no railroad operations. Rock Island lines have been operated only by other carriers under Commission orders or Commission-sponsored lease arrangements.

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*/ ICC Directed Service Order No. 1398, Supplemental Order No. 2 (October 3, 1979) (Tr. App. D-1). This had the effect of materially increasing the cost of directed service, thereby insuring that no rental would be paid the Rock Island for the use of its lines in directed service (since Commission rules provided for the payment of rental for lines only in the event that the directed rail carrier earned a profit on directed service operations). Incredibly, at the same time BRAC successfully insisted upon the immediate rehiring of all of its membership, no matter how costly or wasteful, the unions also won, as a part of the price they exacted from the ICC for their agreement to return to work, a promise from the Acting Chairman of the ICC that the directed rail carrier would "examine the applications for employment of all executive officers employed by the Rock Island with the utmost care." Id. (Tr. App. D-4)

**/ Complaint for Declaratory Judgment and Injunctive Relief, at p. 14, para. 44 (June 5, 1980); Affidavit of William M. Gibbons, Trustee, at pp. 4-5, 13 (June 5, 1980) (Govt. App. Document No. 9).

D. Liquidation and Abandonment

Although directed service took the operating responsibility for the Rock Island out of his hands, the Trustee, pursuant to Judge McGarr's direction, proceeded to prepare a plan of reorganization. On December 28, 1979, the Trustee filed his Plan of Reorganization, which called for the formation of an operating core railroad and a reorganization built around that core. On January 21, 1980, Peat, Marwick, Mitchell & Co. ("Peat, Marwick"), the court's expert, filed its report, which concluded that the Rock Island was not reorganizable even if pared to its most profitable core.*/

Based upon the Rock Island's long history of continuing losses, the conclusion of Peat, Marwick, and the urgings of the Creditors, now joined by the Government, Judge McGarr found that "a continuation of the Rock Island on an income producing basis, whether in core or in whole or in part . . . is just not possible. . . ." Transcript of Proceedings, January 25, 1980, at 100. (RLEA App. 38.) Judge McGarr instructed the Trustee "to continue his present plans for cessation of operations by the time of the anticipated termination of the directed service order" and "to prepare and file with the Court a preliminary plan of liquidation. . . ." Transcript of Proceedings, January 25, 1980,

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*/ Report of Peat, Marwick, Mitchell & Co., at X-1 through X-16 (January 21, 1980).

at 97. (RLEA App. 35.) The Trustee commenced liquidation as ordered by Judge McGarr.

On May 27, 1980, pursuant to Section 1170 of the Bankruptcy Code, 11 U.S.C. § 1170, the Commission filed an advisory report with the Reorganization Court in which it found:

> We conclude that abandonment of the Rock Island and its dissolution as an operating railroad is required by the public convenience and necessity. We have reviewed the carrier's present financial position and future prospects and conclude that it has no realistic hope for reorganization or continued public service in its present form. The extremely deteriorated condition of its plant and severe erosion of its traffic base (through interrupted and uncertain operations) make it clear that the Rock Island will not be able to recover. Consequently, fairness to its creditors and stockholders dictates that the carrier be liquidated.

Chicago, Rock Island & Pacific Railroad Co. - Abandonment, Interstate Commerce Commission Report, Docket AB-46 (Sub-No. 22) (May 27, 1980), at 3-4. (Tr. App. E-33.)

On June 2, 1980, after the submission of briefs by interested parties and oral argument, Judge McGarr confirmed the total abandonment of all Rock Island lines and service on precisely the terms recommended by the Commission. He thus reaffirmed his decision of January 25, 1980, that the Rock Island had no further common carrier obligations. Judge McGarr found:

> [T]hat Rock Island's unconditional discontinuance of service and its total system abandonment is constitutionally mandated

> and . . . that to force a railroad to continue operations indefinitely at a loss in order that the public may be served is a violation of the Fifth Amendment rights of those who have a security interest in the enterprise. Brooks-Scanlon Co. v. Railroad Commission, 251 U.S. 396 (1920).

In its report of May 27, 1980, the Commission specifically referred to a long line of cases in which it had declined to impose labor protection conditions on total line abandonments. Consistent with these precedents, it declined to recommend that the Reorganization Court impose employee protection conditions on the Rock Island's total line abandonment. On June 2, 1980, Judge McGarr also found:

> [C]onsistent with ICC precedent, with the Rock Island's constitutional right to abandon its lines and discontinue its service, and with the equities of the Rock Island situation, no labor protection arrangements may be imposed on the Rock Island estate. . . .

Judge McGarr accordingly ordered:

> That no claim or arrangement of any kind or nature for employee labor protection payable out of the assets of the Debtor's estate is allowed or required by this Court pursuant to Section 17 of the Milwaukee Railroad Restructuring Act and the Trustee is hereby directed not to pay any such claim or to borrow for such purpose, any and all such claims or arrangements being hereby denied and prohibited by the Court.

Order No. 248 (June 2, 1980) (Govt. App. Document No. 4).*/

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*/ The RLEA subsequently twice sought a stay of that order by this Court. On each occasion this Court denied RLEA's request. In re Chicago, Rock Island & Pacific Railroad Company, appeal pending, No. 80-1788, unpublished orders, (7th Cir., June 19 and September 18, 1980).

II. THE ROCK ISLAND ACT

A. The Rock Island Act Scheme.

On May 30, 1980, the President signed the Rock Island Act. In the preamble of the Act Congress found:

> (1) uninterrupted continuation of services over Rock Island lines is dependent on adequate employee protection provisions covering Rock Island Railroad employees who are not hired by other railroads;
>
> (2) for those Rock Island Railroad employees not hired by other rail carriers, there is no other practicable means of obtaining funds to meet the necessary costs of such employee protection that are assumed by the Rock Island Railroad;
>
> (3) a cessation of necessary operations of the Rock Island Railroad would have serious repercussions on the economies of the States in which such railroad principally operates; and
>
> (4) premature cessation of services over lines which are the subject of pending purchase application[s] would result in harm to the shipping public and could imperil continuation of vital commuter service.

Rock Island Act, Section 102. To avoid these perceived evils, Section 106 of the original Rock Island Act required the Trustee and labor unions representing former employees of the Rock Island, within ten days of the Act's enactment, to negotiate and enter into an agreement providing for up to $75,000,000 of labor protection payments to former employees. In the event that no "voluntary" agreement could be reached, Section 106(b) required the Commission to "impose" a labor protection arrangement on the Rock Island estate that is "no less protective of the interests of employees" than the

arrangement imposed on the Milwaukee Railroad by Section 9 of the Milwaukee Railroad Restructuring Act (45 U.S.C. § 908) (the "MRRA"). Section 110 of the Rock Island Act required the Trustee to borrow up to $75,000,000 to cover the costs of labor protection under Section 106.

The Act further provided that all employee claims for labor protection benefits must be treated as administrative expenses of the estate (Section 106(e)(2)) and that the $75,000,000 borrowing must also be treated as an expense of administration of the estate. (Section 110(b))

Section 110(e) of the Act eliminated any liability on the part of the United States in connection with any employee protection arrangement imposed under the Act. Section 106(c) provided that the reorganization court "shall" order the Trustee to implement the arrangement devised by the Commission "immediately" upon issuance of the Commission's order. Section 106(d)(1) of the Act purported to preclude any stay by any court of a Commission or reorganization court employee protection order. Section 106(d)(2) of the Act established a truncated appeal procedure which expressly precluded subsequent review by the Supreme Court.

B. The Preliminary Injunction and Declaratory Judgment

On June 5, 1980, the Trustee, creditors and shareholders requested the Reorganization Court to enjoin the operation of the employee protection provisions of the Rock

Island Act. On June 9, 1980, after the submission of briefs and oral argument, Judge McGarr granted their request. He found an "exceedingly great" probability that the Act's imposition of a new $75,000,000 labor protection claim on the Rock Island estate to serve its purported public purposes, as well as its "truncated" procedural provisions, was an unconstitutional violation of the fifth amendment's prohibition against uncompensated governmental takings of private property for public purposes and the fifth amendment's due process clause. Transcript of Proceedings, June 9, 1980, at 81. (RLEA App. 11-18). Judge McGarr issued a preliminary injunction to maintain the status quo and to preserve the assets of the Rock Island estate pending full judicial review of the constitutionality of the Rock Island Act. (RLEA App. 19-20.) On June 11, 1980, the RLEA filed a Notice of Appeal in the United States Supreme Court pursuant to 28 U.S.C. § 1252.

On June 20, 1980, the Government and the Commission, joined by RLEA, sought to have Judge McGarr reconsider his injunction entered on June 9, 1980. Defendants' Motion to Reconsider Preliminary Injunction. After hearing oral arguments, Judge McGarr denied the motion to reconsider. Transcript of Proceedings, June 20, 1980, at 49-59. (RLEA App. 21-28.)

The next day, the RLEA filed its Application for Stay of the preliminary injunction with Justice Stevens of

the United States Supreme Court, the Circuit Justice for the Seventh Circuit.

On June 28, 1980, Justice Stevens denied the RLEA's motion for a stay of Judge McGarr's injunction pending appeal. Justice Stevens explained:

> [H]aving read the parties' submissions, I am now of the opinion that Judge McGarr was probably correct in concluding that the Act authorizes an unconstitutional taking of property of the estate. It appears to direct a transfer of $75 million off the top of the estate's assets to the employees. While such a transfer might be permissible in the course of a genuine reorganization, at least as of this moment, I have difficulty perceiving how, in the context of a liquidation, this is anything other than a simple taking of the property of the general creditors, as the trustee argues.

RLEA v. Gibbons, supra, 100 S. Ct. at 2671. The full Court sustained Justice Stevens' denial of the stay motion on July 2, 1980. RLEA v. Gibbons, supra, 100 S. Ct. at 3057. The RLEA's appeal remains pending in the United States Supreme Court.

C. The Staggers Rail Act of 1980

On September 29, 1980, in response to these judicial developments, Congress passed amendments to the original Rock Island Act as part of the Staggers Rail Act of 1980. The amendments reenact, without substantial alteration, the same scheme for the imposition of a new $75,000,000 labor

protection obligation on the Rock Island estate which was contained in the original Rock Island Act.*/

Section 701(b)(1) of the Staggers Rail Act reenacts Section 106 of the original Rock Island Act, which imposes the $75,000,000 cost of the Act's new labor protection scheme on the Rock Island estate. The period during which the Trustee and the labor unions are permitted to "negotiate" an agreement is halved. Failing a "voluntary" agreement, the time within which the Commission is required to "impose" a labor protection arrangement is also halved. The Staggers Rail Act eliminated Section 106(d)(1) of the original Act, which precluded any Commission or judicial stay of an order imposing labor protection under the Act, and the last sentence of Section 106(d)(2) of the original Act, which precluded review by the Supreme Court.

Section 701(a)(1) of the Staggers Rail Act also adds a new section on judicial review, Section 124, to the original Rock Island Act. Section 124 mandates that any

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*/ The amendments to the Rock Island Act were apparently enacted in response to election year exigencies. Fred Kroll, the chairman of RLEA and president of BRAC who called the strike against the Rock Island, publicly announced his endorsement of President Carter following the Administration's promise to seek passage of the bill. As reported by the September 25, 1980 edition of the Chicago Tribune (Tr. App. G-1):

> "Kroll also announced he was endorsing President Carter for re-election. The endorsement had been held up pending a promise from the administration to include labor protective provisions in the deregulation bill and help bail out the retirement board, Kroll said."

appeal from any decision of the reorganization court respecting the constitutionality of the Rock Island Act must be taken to this Court (notwithstanding the pendency of appeals of the June 9 injunction in the United States Supreme Court). Section 124(a) also appears to require that this Court must consolidate any appeals of subsequent Rock Island Act orders and the already pending appeals from the orders of the Milwaukee Railroad Reorganization Court respecting the constitutionality of the labor protection provisions of the Milwaukee Railroad Restructuring Act, 45 U.S.C. §§ 907, et seq. ("MRRA"). Section 124(a) also requires that these consolidated appeals must be heard by this Court sitting en banc, and that this Court must render its final decision within 60 days of the filing of the last appeal. Finally, Section 124(c) was added, which provides:

> Nothing in this Act or in the Milwaukee Railroad Restructuring Act (45 U.S.C. § 901 et. seq.) shall limit the right of any person to commence an action in the United States Court of Claims under section 1491 of title 28, United States Code (commonly referred to as the Tucker Act).

D. Motion to Vacate Preliminary Injunction

Based upon these amendments to the original Rock Island Act, on October 7, 1980, the Government, the Commission and the RLEA requested Judge McGarr to vacate his earlier order declaring the Act unconstitutional. On October 15, 1980, after the submission of briefs and oral argument,

Judge McGarr found that the amendments failed to cure the Act's constitutional infirmities and refused to vacate his earlier order. He ruled that the Act remained unconstitutional:

> This court has studied the Staggers Rail Act amendments to the Rock Island Act, has reviewed carefully the arguments of counsel, the documents filed by the various parties, the ruling of June 9, 1980, and the court's knowledge of these proceedings, and it remains clear that the Rock Island estate continues to be exposed to irreparable injury by the provisions of the Rock Island Act as amended by the Staggers Rail Act. The Staggers Rail Act does not cure the defects found in the Rock Island Act. Like its predecessor, the Staggers Rail Act imposes a $75,000,000 cost of administration claim on the Rock Island estate with priority over claims of general creditors and shareholders on the assets of the estate.
>
> Petitioner argues that the statutory scheme can be implemented, the money disbursed, and the validity of the program and extent of the Rock Island liability to finance it, later litigated. This, in fact, cannot be done without irreparable injury to the administration of the estate for the benefit of the creditors. The trustee is currently liquidating assets and preparing the plan for distribution to creditors. Under court order, the trustee is also preparing an interim plan for the immediate partial satisfaction of cost of administration claims. The imposition of a $75,000,000 uncertainty on the estate will totally halt the liquidation for the long period consumed by the appellate process, with irreparable injury to the already long-suffering creditors. Further, the whole liquidation plan will be distorted by the brooding omnipresence of a potential liability representing a significant percentage of the total assets.
>
> Order of October 15, 1980, at 3-4 (RLEA App. 5, 8-9).

This appeal followed.

SUMMARY OF ARGUMENT

Judge McGarr, who is intimately acquainted with the history and condition of the Rock Island estate after supervising these proceedings for more than five years, properly found that the labor protection provisions of the Rock Island Act, as reenacted by the Staggers Rail Act, constitute a clear violation of the the fifth amendment to the United States Constitution; that the procedures prescribed by the amended Rock Island Act also violate the fifth amendment; and that Section 701 of the Staggers Rail Act exposes the estate of the Rock Island to irreparable harm in that the Rock Island estate would suffer an immediate loss of $75,000,000 through the Act's taking of its property for public use. The Trustee, creditors and shareholders further maintain that the Act violates the constitutional principles of separation of powers and equal protection, and the constitutional requirement that the laws on bankruptcy be uniform. Moreover, the addition of an oblique reference to the Tucker Act does nothing to cure these constitutional infirmities.

The amended Rock Island Act's scheme for the imposition of labor protection, including its curtailed procedural provisions and its extraordinary impositions upon this Court, the United States Supreme Court and the District Court in violation of the separation of powers provisions of

the United States Constitution, make it apparent that all of the factors which warranted Judge McGarr's initial injunction and Justice Stevens' and the Supreme Court's denial of a stay of that injunction now require that the injunction continue in effect and that Judge McGarr's order of October 15, 1980 be affirmed by this Court.

ARGUMENT

I.

THE ROCK ISLAND ACT'S EMPLOYEE PROTECTION PROVISIONS COMMIT A TAKING AND DEPRIVATION OF THE ROCK ISLAND ESTATE'S PROPERTY FOR A PURPORTED PUBLIC PURPOSE, IN VIOLATION OF THE FIFTH AMENDMENT.

Under the terms of Sections 106 and 110 of the Rock Island Act, as amended, a taking of the property of the Rock Island estate to fund the Rock Island Act's employee protection scheme must occur. If funded directly from the assets of the estate, a taking would occur immediately. If funded through an enforced federal loan under Section 110, the labor protection obligations created by the Act must still be accorded expense of administration status. The Act's scheme requires that these costs will be payable prior to the interests of the estate's shareholders and unsecured creditors, and may be payable prior to the amounts owed to secured creditors and trade creditors with cost of administration status. Without question, the Act's employee protection scheme would dilute the value of the estate's assets

and reduce the amount available to discharge its existing debts by an amount up to $75,000,000.*/

A. The Rock Island -- A Moribund Railroad Declared Cashless, Abandoned and Unreorganizable -- Has No Obligation To Use Its Funds In The Public Interest.

Congress has declared that protection of former Rock Island employees is essential to achieve the public purpose of continued rail operations, which it considers essential to the economies of the region served by the Rock Island. Rock Island Act, Section 102. However, Congress seeks to achieve its purpose by imposing an obligation on the Rock Island estate. In effect, Congress is seeking to support continued rail operations in the region formerly served by the Rock Island by imposing a $75,000,000 burden on the Rock Island estate. In so doing Congress has clearly violated the fifth amendment rights of the Rock Island estate, its creditors and shareholders.

Railroads may be required to continue operations at a loss for a reasonable period and to suffer diminution in their property values to serve legitimate governmental interests in maintaining the national transportation system. However, this permissible governmental interference with private interest is limited by the fifth amendment.

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*/ The $75,000,000 taking mandated by the Act represents approximately twenty-five percent of the estate's total liquidation value, by the Trustee's most recent estimates.

Regional Rail Reorganization Act Cases ("3R Act Cases"), 419 U.S. 102, 122 (1974).

In Brooks-Scanlon Co. v. Railroad Commission, 251 U.S. 396, 399 (1920), Justice Holmes stated the governing principle that:

> A carrier cannot be compelled to carry on even a branch of business at a loss, much less the whole business of carriage . . . . If the plaintiff be taken to have granted to the public an interest in the use of the railroad it may withdraw its grant by discontinuing the use when that use can be kept up only at a loss.

Accord, Bullock v. Railroad Commission, 254 U.S. 513 (1921); Railroad Commission v. Eastern Texas Railroad Co., 264 U.S. 79, 85 (1924); In re Penn Central Transportation Co., 384 F. Supp. 895, 918-19 (Special Ct. 1974); In re Penn Central Transportation Co., 382 F. Supp. 856, 868 (E.D. Pa. 1974). In In re Central Railroad Company of New Jersey, 485 F.2d 208, 213 (3d. Cir. 1973), cert. denied, 414 U.S. 1131 (1974), the court recognized "the basic principle that an owner of property retains the right ultimately to withdraw that property from a losing venture. Indeed, such a right appears to be a fundament of the taking provision."

Here, the Reorganization Court has determined that the Rock Island is constitutionally entitled to withdraw from the universe of industries subject to public regulation. As the district court found, reorganization of the Rock Island is no longer possible. The limited period during which Rock Island investors can be assumed to have

agreed to commit the estate's resources to the public's transportation needs is long past.

Very recently this Court held in connection with the embargo orders and related borrowings by the Milwaukee Road, that it is "settled that a railroad that is cashless cannot be required to continue operating to serve the public interest." In re Chicago, Milwaukee, St. P. & Pacific Railroad Co., 611 F.2d 662, 669 (7th Cir. 1979), rehearing denied (January 2, 1980) ("Milwaukee Embargo").*/ This Court recognized that the Milwaukee Road could not be compelled to continue to serve the public interest unless there was some realistic prospect of its reorganization and that, absent that prospect, its state of cashlessness would have permitted

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*/ In Milwaukee Embargo, supra, this Court explained that cashlessness of a railroad exists under the following conditions:

> (1) the trustee "after all reasonable efforts . . . was faced with an imminent depletion of cash that would make it impossible for him to pay current bills for wages, supplies, interline balances, and similar expenses, and still leave an amount sufficient to permit an orderly liquidation." Penn Central, 384 F. Supp. at 919, n.31;
>
> (2) the railroad is unable to obtain other funds without significantly threatening the interests of secured and unsecured creditors; and
>
> (3) there are insufficient funds made available by governmental bodies to allow the railroad to continue in existence. Valuation Proceedings, 439 F. Supp. at 1375-77 (7th Cir.)(1979).

611 F.2d at 669.

[Footnote continued on following page.]

the Milwaukee to discontinue all service notwithstanding the public interest. This Court cited Brooks-Scanlon, supra; Valuation Proceedings, 439 F. Supp. 1351-77 (Special Court 1977); and In re Penn Central Transportation Co., 384 F. Supp. 895, 918-19 and n.31 (Special Court 1974).

In contrast to the Milwaukee Road, the Rock Island is cashless, unreorganizable and formally abandoned. Clearly, under the Milwaukee Embargo and the Brooks-Scanlon principles, the Rock Island can have no continuing obligation to serve the public interest.

Relying on Interstate Commerce Commission v. Railway Labor Executives' Ass'n, 315 U.S. 373 (1942), and United States v. Lowden, 308 U.S. 225 (1939), the RLEA, the Milwaukee Trustee, and the United States have argued that the Rock Island labor protection program must be imposed on the Rock Island estate because it furthers national transportation policies which require that a stable railway labor force be available to serve the public's interest. What the Appellants and the Milwaukee Trustee fail to recognize when

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[Footnote continued from preceding page.]

On September 26, 1979, the Interstate Commerce Commission declared the Rock Island to be cashless and directed the Kansas City Terminal to take over the operations of the Rock Island pursuant to 49 U.S.C. 11125(a)(1). Directed Service Order No. 1398, 44 Fed.Reg. 56,343 (1979).

On that date (if not earlier) the Rock Island satisfied each of these conditions. The Commission had recognized that the railroad was without cash. There was no available alternative for funding, and the Government specifically refused to finance the Rock Island's operation. ICC Directed Service Order No. 1398, App. A, (Tr. App. C-45).

they apply the language of Lowden to the provisions of the Rock Island Act is that the public interest lies in a national transportation system, and that railway labor is only a component of that broader public interest.

The point missed by the Milwaukee Trustee, the United States and RLEA is that the constitutional right to withdraw from the railway business is measured against the public interest generally. The Brooks-Scanlon line of cases holds, and this Court has held, that where a railroad is cashless and not reorganizable, its right to cease operations is consistent with the public interest in all its aspects. It is axiomatic that if a private enterprise cannot be required to continue to devote its resources to further the overall national transportation policy because it is cashless and unreorganizable, it cannot be required to expend its funds to further a component of that policy.

B. New Obligations May Not Constitutionally Be Imposed On A Bankrupt Estate Where There Is No Possibility Of Reorganization.

The cases in which debts for continued operations have been imposed on bankrupt railroads have been limited to instances where there remained some hope of an income based reorganization. The theory of such exercises of governmental regulatory powers was described by the Supreme Court in the 3R Act Cases, where it stated that the general Brooks-Scanlon rule:

> is qualified by the requirement that a railroad estate suffer interim losses for a reasonable period pending good-faith efforts to develop a feasible reorganizaton plan if the public interest in continued rail service justifies the requirement.

419 U.S. at 122-123 (emphasis supplied) (citation omitted).

In Continental Bank v. Chicago, R. I. & P. R.R. Co., 294 U.S. 648 (1935), the Supreme Court upheld an injunction which deferred the right of secured creditors to sell collateral where the sale would have impaired the ability of the Court to achieve a successful reorganization under Section 77 of the Bankruptcy Act. This deferral was permissible to enable the successful reorganization of the railroad, only where the existing rights of all creditors would be benefitted by successful reorganization. 294 U.S. at 676-7. The reasoning of 3R Act Cases and Continental Bank is clear -- to require continued operations for a reasonable period to permit pursuit of an income-based reorganization discharges the legitimate governmental purpose in assuring continued rail operations. If successful, such continued operation may benefit the creditors of the estate through the resurrection of their capital investments. Here, after five years of efforts at such a reorganization, the Commission, the FRA and the Reorganization Court have agreed that the Rock Island is not reorganizable. Neither the Commission nor the Government has challenged this fundamental conclusion in these or in any other appeals.

In no case have additional priority debts or other clear impairments of property rights been imposed upon a bankrupt railroad's estate without some connection to an anticipated reorganization. Earlier in these reorganization proceedings Judge McGarr approved, and this Court upheld, a priority borrowing by the Trustee to support continued deficit operations of the Rock Island, even though that borrowing would for a time displace the interests of the estate's creditors, on the theory that the borrowing might preserve the ultimate possibility of a successful income-based reorganization, in which the creditors would receive full satisfaction of their claims. In re Chicago, R.I. & P. Ry. Co., 545 F.2d 1087 (7th Cir. 1976). Now that reorganization of the Rock Island is impossible, the imposition of any priority borrowing on this estate to fund the Rock Island Act's labor protection program is impermissible. The harm to the Rock Island creditors through the Rock Island Act's imposition of a new $75,000,000 expense of administration is certain and actual.

This Court reiterated the Brooks-Scanlon limitation on governmental regulation of railroad capital in its recent Milwaukee Embargo decision, supra, where it stated:

> To force a railroad to continue operations indefinitely at a loss in order that the public may be served is a violation of the Fifth Amendment rights of those who have a security interest in the enterprise. Brooks-Scanlon Co. v. Railroad Commission, 251 U.S. 396 (1920).

611 F.2d at 666. In its Milwaukee Embargo decision, this Court permitted the issuance of trustee's certificates to permit operations over a reduced portion of the Milwaukee Road pending the submission of a reorganization plan for income-based operations over a reduced core system. No one suggests that a reorganization of the Rock Island is possible.

If the purported public purpose stated in the Rock Island Act is to be served by the Act's provisions, the constitutional principle set forth in Brooks-Scanlon, supra, and its progeny require that the Rock Island estate can no longer be required to bear expenses to accomplish this public purpose.*/

C. If The Government Believes That The Public Interest Requires Protection To Former Rock Island Employees, Then The Government Must Pay For It.

It is unfortunate that the former employees of the Rock Island have lost their means of livelihood in the course of the estate's cessation of railroad operations. However, as in every other case, if the Act's purported public purpose of continued rail operatons is to be met through the continued support of former Rock Island employees,

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*/ Moreover, it seems clear that, if Congress legitimately considered the "public purpose" of the Rock Island Act scheme to be the provision of rail service over Rock Island lines, it could have done so more effectively by providing funds to the Trustee to continue operations as a rail entity when continued operations became impossible in September, 1979.

the cost of that support may not be charged to the bankrupt estate of their former employer, without governmental compensation which is "a full and perfect equivalent for the property taken." Monongahela Navigation Co. v. United States, 148 U.S. 312 326 (1893); United States v. Reynolds, 397 U.S. 14, 16 (1970).

Justice Holmes stated the general principle limiting governmental regulation which underlies the Brooks-Scanlon holding, in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415-416 (1922):

> The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. It may be doubted how far exceptional cases, like the blowing up of a house to stop a conflagration, go -- and if they go beyond the general rule, whether they do not stand as much upon tradition as upon principle. . . . In general it is not plain that a man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders . . . . We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. (Citations omitted; emphasis supplied.)

D. The Milwaukee Road Is An Ongoing Rail Entity In Contrast To The Rock Island, Which Is Unreorganizable And In Liquidation.

Appellants and the Milwaukee Road Trustee rely on Judge McMillen's approval of the Milwaukee Trustee's

request to issue $75,000,000 in expense of administration certificates to fund the payment of labor claims under the Milwaukee Railroad Restructuring Act, 45 U.S.C. §§ 907, et seq. ("MRRA"), to support the imposition of labor protection obligations on the Rock Island. In re Chicago Milwaukee, St. P. & P. R.R. Co., No. 77 B 8999, Order No. 286 (N.D. Ill., February 7, 1980).*/

This reliance is misplaced because the situation of the Rock Island presents a stark contrast to the Milwaukee Road. The Milwaukee Road is progressing steadily toward reorganization. Recently, the Milwaukee Trustee consummated a sale of Milwaukee Land Company assets in the amount of $140,000,000. On October 17, 1980, the Milwaukee Reorganization Court found that the possibility of reorganization still exists for the Milwaukee Road. In re Chicago, Milwaukee, St. P. & P. R.R. Co., Order No. 406. The Milwaukee

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*/ As stated above, the level of employee protection benefits to be imposed on the Rock Island under the Rock Island Act is measured by the level of protection imposed by the MRRA. Congressional action in fixing Rock Island Act benefits at the exact sum specified for benefits for Milwaukee Road employees underscores the arbitrariness of the Rock Island Act scheme. The MRRA and the Rock Island Act both fix the ceiling for benefits that may be paid thereunder at $75,000,000. However, the asset base of the Milwaukee Road is twice as large as that of the Rock Island and the Milwaukee Road has employed approximately twice the number of employees as has the Rock Island. Moreover, the Milwaukee Road has had existing labor agreements with BRAC and other railway workers' unions, and therefore may have pre-existing contractual obligations to those employees, which the Rock Island does not.

Trustee in his brief in the MRRA labor protection appeal to this Court clearly anticipates successful reorganization of the Milwaukee Road. Judge McMillen, the Milwaukee Trustee, and the Congress which enacted the MRRA, all expect the Milwaukee Road to achieve reorganization as a viable enterprise. Thus, the Milwaukee Road estate may benefit from the implementation of the MRRA's labor protection program, because such a program may increase the likelihood of a successful reorganization.

In contrast to the Milwaukee Road situation, Judge McGarr, the Congress, and the Rock Island Trustee have acknowledged that no such hope remains for the Rock Island. This is precisely the distinction upon which the Supreme Court in the 3R Act Cases, supra, and this Court in its earlier Milwaukee Embargo and Rock Island opinions have relied in permitting the imposition of additional obligations in the past.

Judge McGarr noted the clear difference between the Milwaukee Road and the Rock Island situations in the initial hearing on the preliminary injunction of June 9, 1980:

> I'm not aware that it has ever been held that Congress can single out a private industry in bankruptcy and legislate for this single company only labor-mangement rights. I'm aware that in the Milwaukee Act something of that nature seems to have been done. I'm not sure that I agree with Judge McMillen and his conclusions, but neither do I disagree, because his situation is so different than the one before me that

> I don't find it analogous. The Milwaukee continues to operate, the Milwaukee has problems the Rock Island doesn't have, and the Milwaukee is in a situation the Rock Island is not in.

Transcript of Proceedings, June 9, 1980, at 77. Similarly, in his opinion denying the RLEA's request for a stay of the June 9 injunction, Justice Stevens noted "that the 'Milwaukee bill' concerned a genuine railroad reorganization, not a liquidation." RLEA v. Gibbons, supra, 100 S. Ct. at 2670, n.1.*/

The distinction drawn by Judge McGarr and Justice Stevens between the reorganizing Milwaukee Road and the liquidating Rock Island is central to the reasoning which has governed the imposition on railroads of burdens intended to serve the public interest. The teaching of the Brooks-Scanlon line of cases is that although the public interest may authorize governmental regulation to a reasonable degree, at some point, the public interest can no longer justify this governmental use of private property.

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*/ The Milwaukee Road's situation is distinguishable for additional reasons. The Milwaukee Trustee supports labor protection, participated in the drafting of the MRRA, voluntarily entered into a labor protection agreement under the MRRA with Judge McMillen's approval, and in so doing, settled acknowledged labor protection obligations.

E. The Rock Island Had No Existing Labor Protection Obligation. Therefore, The Rock Island Act Can Confer No Benefit On The Rock Island Estate.

The Government, the Commission and the RLEA argue that the Rock Island estate is benefited by the employee protection provisions of the Rock Island Act, on the theory that the Act merely quantifies existing labor protection obligations of the estate.*/

On June 2, 1980, Judge McGarr ruled that the Rock Island estate is constitutionally entitled to complete abandonment of all its lines and common carrier obligations, and that it has and constitutionally can have no labor protection obligations under existing law. This ruling was consistent with the unbroken series of Commission decisions refusing to impose labor protection obligations in total line abandonments. See Transcript of Proceedings, June 2, 1980, at 62-63.

In connection with his abandonment authorization of June 2, 1980, Judge McGarr considered the requirement of Section 17(a) of the Milwaukee Railroad Restructuring Act:

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*/ Section 108 of the Act provides that employees receiving assistance under the Act "shall be deemed to waive any employee protection benefits otherwise available to such employee under the Bankruptcy Act, Title 11 of the United States Code, subtitle IV of Title 49 of the United States Code, or any applicable contract or agreement. . . ." It is clear that no benefit will devolve to the estate through this election provision, since the Reorganization Court has already determined that the estate has no remaining obligations under these statutes.

> [I]n authorizing any abandonment pursuant to this section, the court shall require the carrier to provide a fair arrangement at least as protective of the interests of employees as that required under Section 11347 of title 49 of the United States Code.*/

This statute gives reorganization courts power to deal with labor protection in abandonments -- a power formerly granted to the I.C.C. In enacting Section 17(a), Congress intended "no change in existing law as it affects employee protection." H.R. Conference Rep. No. 96-583, 96th Cong., 1st Sess. 27 (1979). Thus, Section 17(a) mandates that a reorganization court impose labor protection at the level which would have been imposed by the Commission prior to the enactment of Section 17(a).

Prior to the enactment of Section 17(a), Commission approval of abandonments of railroad lines was governed by 49 U.S.C. § 10903, which like Section 17(a) incorporates

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*/ The legislative history of Section 17(a) indicates that "no change in existing law as it affects employee protection" is intended thereby. H.R. Conf. Rep. No. 96-583, 96th Cong., 1st Sess. 27 (1979). Thus, Section 17(a) mandates that the court impose labor protection in accordance with that which would be imposed by the ICC pursuant to 49 U.S.C. § 11347.

Section 11347 provides that the ICC shall require a "carrier to provide a fair arrangement at least as protective of the interest of employees who are affected by a [consolidation, merger or acquistion] as the terms imposed under this section before February 5, 1976, and the terms established under section 565 of title 45." 49 U.S.C. § 11347. Section 11347 is the recodification of Section 5(2)(f) of the Interstate Commerce Act, 49 U.S.C. § 5(2)(f). By its terms Section 11347 applies only to labor protection to be accorded in consolidation, mergers and acquisitions.

Section 11347 by reference. When Congress enacted 49 U.S.C. § 10903, it was specifically recognized that total termination of service and system-wide abandonment situations such as the Rock Island's are unique situations and subject to their own set of rules. The legislative history of Section 10903 makes the point plainly, referring to:

> [E]mployee protection no less beneficial than that established under Section 5(2)(f) of the Interstate Commerce Act and Section 405 of the Rail Passenger Service Act but without intention to change the policy and practice of the Commission in connection with certificates involving total termination of service by a railroad company. (Emphasis supplied.)

S. Conf. Rep. No. 94-595, 94th Cong., 1st Sess. 218 (1976).

The Commission has consistently declined to impose labor protective conditions in situations involving the abandonment of a railroad's entire line.*/ See, e.g., East Carolina Railway Co. Abandonment, 324 I.C.C. 506 (1964). In Okmulgee Northern Railway Abandonment, 320 I.C.C. 637, 645 (1964), the Commission stated:

> [T]he imposition of protective conditions in proceedings such as these, where a carrier proposes to abandon its entire line

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*/ Montpelier & Barre Railroad Co. Abandonment (Dkt. No. AB-202 F) ____ I.C.C. ____ (1980); Northampton & Bath Railroad Co. Abandonment, 354 I.C.C. 784, 785-86 (1978); Wellsville, Addison & Galeton Railroad Corp. Abandonment, 354 I.C.C. 744, 746 (1978); Tennessee Central Railway Co. Abandonment, 333 I.C.C. 443, 453-54 (1968); Okmulgee Northern Railway Co. Abandonment, 320 I.C.C. 637, 645-46 (1964); Rutland Railway Corp. Abandonment, 317 I.C.C. 393 (1962), aff'd sub nom. Brotherhood of Locomotive Engineers v. United States, 217 F. Supp. 98 (N.D. Ohio 1963); Chicago, Attica & Southern Railroad Co. Abandonment, 261 I.C.C. 646 (1946).

> of railroad normally is not warranted, and would not serve, in most instances, to strengthen the transportation system within the contemplation of the national transportation policy. A departure from this principle in particular cases must be supported by clear and convincing evidence.

The ground for such rulings is clear: the public interest in continued rail operations simply is not served by the payment of labor protection to employees no longer needed because the public interest mandates that the total rail systems on which they were employed be abandoned.

In the recent case of Wellsville, Addison & Galeton Railroad Corp. Abandonment, 354 I.C.C. 744, 746 (1978), the Commission stated:

> Prior Commission precedent in this area is well established. Employee protective conditions have not been imposed in cases involving complete abandonment of operations, because the Commission found it unwarranted to require further consumption of a railroad's properties for the payment of employees after the railroad ceases operations. Okmulgee Northern Ry. Co. Abandonment, 320 I.C.C. 637 (1964). Tennessee Central Ry. Co. Abandonment, 333 I.C.C. 443, 454 (1968). [Applicant] has no corporate parent that would benefit from the abandonment of the railroad. . . . The prior decision will be modified to remove all references to employee protection, specifically those conditions for protection of employees as set forth in Oregon Short Line R. Co. -- Abandonment -- Goshen, 354 I.C.C. 76 (1977).

Thus, the Commission has recognized that where no benefit accrues to a surviving railroad entity through the termination of service on unnecessary lines, it would be unfair to impose labor protection conditions on the abandonment.

The Rock Island situation is singularly parallel to that of the Tennessee Central Railway. Like the Rock Island, the Tennessee Central had suffered years of consecutive losses and had consumed its stockholders' equity to offset those operating losses. The Tennessee Central had no hope of survival as a going concern. Given this history, the Commission concluded that "it was neither equitable nor warranted. . .to require further consumption of the railroad properties for the payment of employees after the railroad ceases operation." 333 I.C.C. at 454. In Tennessee Central, the Commission stated:

> The applicant is a bankrupt business entity unable to meet either its long-term or immediate financial obligations. Despite its straitened financial circumstances through the years, TC has provided regular employment for its work force and has paid its employees in full satisfaction of the terms of their collective bargaining agreements. On the other hand, it has for many years been unable to provide a return of any kind to its stockholders and has fallen substantially short of meeting its legal obligations to others upon whom it has drawn for supplies, materials and equipment needed to sustain its operation. To the extent it is delinquent on car rentals, per diem and interline traffic accounts, its operation is being sustained in part by other railroads and equipment-leasing companies. To the extent it has paid the payroll and other current operating expenses while neglecting other obligations due, the railroad and its employees have been sustained by the creditors. Over the past 5 profitless years, the aggregate deficit has come to nearly $5 million, the stockholder's equity has been consumed in maintaining operations, assets are being further eroded, and the TC has reached the point where it cannot hope, as a going concern, to pay off its creditors. In such a situation, <u>we find it neither equitable nor</u>

> warranted on any ground, to require continued operation for the purpose of providing jobs for the carrier's employees or to require further consumption of the railroad properties for the payment of employees after the railroad ceases operation. In reaching this conclusion we are mindful of the fact that certain unemployment compensation is otherwise available to employees. Unlike the circumstances in Washington and Old Dominion R. Abandonment - Virginia, 331 I.C.C. 587, or East Carolina Ry. Abandonment, 324 I.C.C. 506, TC is not affiliated with a large, financially strong corporation benefiting from the abandonment and capable of sharing some of the costs incident to an abandonment. The facts of this case do not warrant the imposition of labor protective conditions, and they will not be imposed.

333 I.C.C. at 453-54. (Emphasis supplied.)*/

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*/ The Commission has imposed labor protection conditions on entire line abandonments in only two narrowly defined circumstances which are inapposite to the Rock Island situation: (1) where the corporate parent of the abandoning rail carrier is itself a rail carrier which intends to assume all or some portion of the subsidiary's operations but be relieved of its deficit operation, and (2) where the corporate parent, whether or not a carrier, obtained financial benefits from the disposition of the abandoned properties far in excess of the sum of the parent's net investment in the subsidiary and the aggregate of the operational deficits incurred by the subsidiary in the years following the parent's acquisition of the subsidiary's stock. See, e.g., Wolfeboro Railroad Co. Entire Line Abandonment, I.C.C. Docket No. 208F slip op. at 2-3 (October 3, 1979.) Washington & Old Dominion Railway Abandonment, 331 I.C.C. 587 (1968). Savannah Union Station Company Abandonment, embraced in Seaboard Air Line Railroad Co. Trackage Rights, 312 I.C.C. 797 (1962). Northampton & Bath Railroad Co. Abandonment, 354 I.C.C. 784 (1978).

Clearly, neither of these circumstances is present in the Rock Island's case. No corporate parent will survive to obtain the benefits of the abandonment or create a fund from which such benefits may be drawn. The authorization of abandonment for the Rock Island was not a windfall from which additional profits could be expected. Rather, it was merely a recognition of the estate's constitutionally required right to withdraw its assets from a losing operation.

The Commission reaffirmed its general policy to decline to impose labor protection conditions on total line abandonments in its advisory report to the Reorganization Court on May 27, 1980 (Tr. App. E-16-17). This long line of Commission precedents and the constitutional principles of Brooks-Scanlon, supra, underlie the Reorganization Court's finding of June 2, 1980, that to require the payment of further labor protection obligations in connection with the abandonment of Rock Island lines would be constitutionally impermissible and equitably unwarranted.

As the Reorganization Court recognized in its ruling of June 9, 1980, no benefit to the estate can be implied from those provisions of the Act that purport to substitute a new form of labor protection for any existing labor protection, because no further labor protection obligations may constitutionally be imposed on this estate, whether their purpose be to further the national transportation policy or not. Thus, the Rock Island Act cannot be said to have "quantified" an existing obligation of the Rock Island estate. Rather the Rock Island Act employee protection obligations are wholly new obligations imposed retroactively on the bankrupt estate, to the inevitable detriment of the estate and its creditors and shareholders.

F. The New Obligation Imposed By The Rock Island Act Is Not Legitimate Governmental Regulation.

The Milwaukee Trustee, the RLEA and the Government argue that the Rock Island Act is valid economic regulation

of employer-employee relations. The Milwaukee Trustee cites cases which have upheld statutes of general applicability which imposed standards or conditions for future economic relationships or effectuated existing obligations. However, the Milwaukee Trustee and the Government have pointed to no case upholding legislation which, like the Rock Island Act, creates a new burden unrelated to existing obligations or benefits.

For example, the Milwaukee Trustee depends on Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976), in which the Court upheld the Black Lung Benefits Act of 1972, which obligated mining operators to compensate past, as well as present, employees afflicted with black lung disease. However, the Black Lung Act only "allocated" the existing interlocking rights and duties of employers and employees, but did not create wholly new obligations. 428 U.S. at 15. Moreover, the Court specifically noted that "a substantial portion of the burden for disabilities stemming from the period prior to enactment is borne by the Federal Government." 428 U.S. at 18.*/

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*/ The Turner-Elkhorn Court indicated that the Black Lung Act was different from other economic legislation, which might not be so favorably viewed by the courts:

> The point of the black lung benefit provisions is not simply to increase or supplement a former employee's salary to meet his generalized need for funds. Rather, the purpose of the Act is to satisfy a specific need created by the dangerous conditions under which the former employee labored -- to allocate to the mine operator an actual, measurable cost of his business.

428 U.S. at 19.

In United States v. Lowden, supra, relied on by the Milwaukee Trustee and RLEA, the Supreme Court upheld regulations which provided that the Commission could condition its approval of railroad consolidations upon the provision of labor protection to adversely affected employees. Like the regulation in I.C.C. v. Railway Labor Executives' Association, 315 U.S. 373 (1942), and the cases cited by the Milwaukee Trustee (Milwaukee Trustee's Brief at 22), the Lowden regulation was to apply prospectively, rather than to create new obligations governing employment relations that had already ended.*/

The Supreme Court has at least twice invalidated legislation which, like the Rock Island Act, attempted to impose "retroactive" economic burdens. In Railroad Retirement Board v. Alton Railroad Co., 295 U.S. 330 (1935), the Supreme Court invalidated as a violation of the due process clause the Railroad Retirement Act of 1935, which attempted to impose a compulsory retirement and pension system upon all interstate carriers by rail. The Act required employers to pay the cost of retirement pensions for all workers presently employed as well as for workers whose employment had terminated in the year prior to enactment.

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*/ Moreover, the Lowden railway labor protective conditions were to be undertaken voluntarily. The railroad could choose to accept the conditions or forego the consolidation.

Whatever the legislative purpose, the Court found it arbitrary to impose "liability to pay again for services long since rendered and fully compensated." 295 U.S. at 354. The Court held:

> The provision is not only retroactive in that it resurrects for new burdens transactions long since past and closed; but as to some of the railroad companies it constitutes a naked appropriation of private property upon the basis of transactions with which the owners of the property were never connected. Thus the Act denies due process of law by taking the property of one and bestowing it upon another. This onerous financial burden cannot be justified upon the plea that it is in the interest of economy, or will promote efficiency or safety.

295 U.S. at 349-50.*/

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*/ The impermissibility of the requirement that the private resources of the Rock Island estate be committed to a public purpose is especially clear where, as in the Rock Island's case, the public interest purportedly to be served bears no logical relation to the original commitment of resources to an industry subject to public regulation. Here, the purported public interest of a Rock Island employee protection plan is to assure the continuation of rail services over Rock Island lines. However, the employees who would benefit by the Rock Island Act scheme are those not hired by other carriers operating over Rock Island lines. Because the United States has continued to fund directed service operations over those lines considered crucial to the national transportation system, and other carriers and non-carrier entities have continued operations over those lines whose operation offered economic advantage, and former Rock Island employees were given preference for employment in service over Rock Island lines, those employees not hired are those who are simply not needed for the operation of the nation's transportation system. Thus, the public interest served is not that of temporary support for employees valuable to the national rail system.

[Footnote continued on following page.]

Similarly, in Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978), the Supreme Court invalidated under the contract clause a 1974 Minnesota act, under which a narrow class of private employers could be subjected to a special "pension funding charge," providing greater coverage to employees than they were entitled to under existing pension plans. Finding the Minnesota legislation arbitrary and irrational, the Court pointed out that the legislation imposed "a sudden, totally unanticipated, and substantial retroactive obligation upon the company to its employees." 438 U.S. at 249.*/

[Footnote continued from preceding page.]

The employees affected are those whose rail employment is simply not justified in economic terms.

Rather than directly serving the national interest by preserving an important skilled work force, the only "public benefit" which could be gained from the Act's employee protection system is the prevention of rail strikes by employees not affected by the cessation of operations over Rock Island lines, in sympathy with those former Rock Island employees no longer needed to operate abandoned rail lines. See p. 18, footnote, infra.

It would be the height of irony that the Rock Island estate could be compelled to suffer the loss of over one-quarter of its value to prevent labor strife when it was precisely a strike improvidently called by BRAC that caused the Rock Island's demise.

*/ Moreover, the Spannaus Court noted that the law did not deal with a general social problem, but benefitted only a single "favored" group. 438 U.S. at 242, 250. The Rock Island Act, being solely designed to impose a burden on the Rock Island for the benefit of its former employees is even narrower legislation than that invalidated in Spannaus.

In all of the cases relied on by the Milwaukee Road Trustee, including the cases of the Chrysler Corporation and the Milwaukee Road, where Congress chose to meet a threatened unemployment crisis, it did so by providing substantial federal assistance to ensure the survival of the employer as an economic entity.*/

Moreover, since Congress has chosen to confer administrative expense status on the Act's labor protection obligation, the clear effect of this classification is to work an unconstitutional taking of creditor's rights in the property of the Rock Island.**/ A case directly on point is Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935).

In Radford, the Court considered certain sections of the Frazier-Lemke Act which allowed mortgagors who failed to obtain consents requisite to a composition under Section 75 of the Bankruptcy Act, to acquire, upon adjudication of

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*/ Obvious examples of this disparate treatment appear in the Staggers Rail Act of 1980. Section 701(c)(1) of the Staggers Rail Act amended the MRRA, 45 U.S.C. § 906(h)(1), to forgive $55,000,000 in priority loans to the Milwaukee Road. Section 504 of the Staggers Rail Act amends Section 509 of the 3R Act, 45 U.S.C. § 779, to add $135,000,000 to the $500,000,000 fund already provided for assistance to former employees of Conrail.

**/ In particular, the Act violates the constitutional rights of the First Mortgage Bondholders whose security, pursuant to an Indenture of Mortgage dated as of January 1, 1950, is comprised of the entire Rock Island system. However, insofar as the Rock Island Act also displaces the interest of administrative claimants, unsecured creditors and shareholders, it also offends their fifth amendment rights under Radford.

bankruptcy, alternative options with respect to the mortgaged property, thus retroactively affecting the rights of the mortgagee in specific property held as security.

It was argued that the challenged statute's changes in the mortgagees' property rights were permissible due to the grave emergency which then confronted the nation's farmers by the prospect of widespread foreclosure of farm mortgages and the resultant transformation of farmer-owners into tenants or farm laborers. It was argued that the Frazier-Lemke Act was an appropriate remedy to this threatened calamity. 295 U.S. at 598-599. Despite judicial notice of these compelling economic considerations against the backdrop of the Great Depression, the Radford court concluded that the Frazier-Lemke Act as applied unconstitutionally deprived mortgagees of their rights in specific property. Justice Brandeis declared:

> [T]he Fifth Amendment commands that, however great the Nation's need, private property shall not be thus taken even for a wholly public use without just compensation. If the public interest requires, and permits, the taking of property of individual mortgagees in order to relieve the necessities of individual mortgagors, resort must be had to proceedings by eminent domain; so that, through taxation, the burden of the relief afforded in the public interest may be borne by the public.

295 U.S. at 602 (emphasis supplied).

Thus, whatever the public policy motivations for the Rock Island Act, its imposition on the Rock Island estate of a new administrative expense, which confers no benefit upon the estate directly affronts the Radford principle.

II.

THE POSSIBILITY OF A LATER TUCKER ACT REMEDY CANNOT JUSTIFY OTHERWISE UNCONSTITUTIONAL GOVERNMENTAL ACTS

Appellants' motions to vacate Judge McGarr's June 9 injunction and their briefs to this Court are premised on the superficial changes in procedure contained in the Staggers Rail Act amendments to the Rock Island Act. If this Court agrees to consider this case at all, it should address only the issue raised in the motions to vacate the June 9 injunction. This Court should consider only the conclusion of Judge McGarr on October 15, 1980, that the changes made by the Staggers Rail Act are only cosmetic and do not remedy the basic constitutional infirmities of the Rock Island Act.

Appellants rely primarily on the amendment to Section 124(a) of the Rock Island Act,*/ which states that the statute does not limit any right of the Rock Island estate to bring a subsequent suit under Section 1491 of Title 28 of the United States Code (the "Tucker Act"), should the labor protection provisions of the Act prove to be unconstitutional. The Tucker Act permits the Court of

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*/ The exact language of Section 701(a)(1) of the Staggers Rail Act of 1980 as it amends Section 124(c) of the Rock Island Act is:

> Nothing in this Act or in the Milwaukee Railroad Restructuring Act (45 U.S.C. 901, et seq.) shall limit the right of any person to commence an action in the Court of Claims under section 1491 of title 28, United States Code (commonly referred to as the Tucker Act).

Claims to entertain claims against the United States which are:

> [F]ounded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

Congress and Appellants have mistakenly assumed that a mere oblique reference to the Tucker Act is sufficient to authorize the prior commission of an otherwise unconstitutional act.

Appellants' misapprehension as to the effect of a provision which does not bar a later uncertain remedy for the taking of the estate's property flies in the face of the most basic due process principles of our Constitution. It is founded on the proposition that a likely violation of fifth amendment property and due process rights may be authorized if a later possibility of redress remains.

The United States Supreme Court has found inherently unacceptable propositions such as that advanced by Appellants in discussions concerning basic due process rights. For example, in Fuentes v. Shevin, 407 U.S. 67 (1972), the Court set forth the procedural due process requirement of notice and opportunity for a hearing prior to the seizure of property. The Court's reasoning discredited

the very proposition relied on by Appellants in support of their motions to vacate and their requests for a stay:

> If the right to notice and hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented. At a later hearing, an individual's possessions can be returned to him if they were unfairly or mistakenly taken in the first place. Damages may even be awarded to him for the wrongful deprivation. But no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. 'This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone.' Stanley v. Illinois, 405 U.S. 645, 647 [1972].

407 U.S. at 81-82. (Emphasis supplied.) The principle applied is clear: a violation of constitutional rights, even if only temporary, is in itself irreparable injury. The procedure suggested by Appellants is thus truly extraordinary, and is fundamentally inconsistent with the central principles of protection of due process rights.

A. The Tucker Act Is Merely A Jurisdictional Grant And Confers No Substantive Rights.

In the recent case of United States v. Testan, 424 U.S. 392, 398 (1976), the Supreme Court noted that "[t]he Tucker Act . . . is itself only a jurisdictional statute; it does not create any substantive right enforceable against the United States for money damages." (Emphasis supplied.)

The distinctions between the usual Tucker Act cases described by the Testan court, supra, and the case at

bar are fundamental. First, a Tucker Act remedy requires a clear acknowledgment of federal liability, see, e.g., Testan, supra, 424 U.S. at 400-401; Whiskers v. United States, 600 F.2d 1332 (10th Cir. 1979), cert. denied, 100 S. Ct. 1028 (1979). The Rock Island Act contains no such acknowledgment, nor any assurance that the Government will pay the $75,000,000 cost of the Act's labor protection scheme if compensation is later found to be owed. Secondly, the Tucker Act is intended to remedy only certain governmental wrongs which have already occurred. The Tucker Act provision in the Rock Island Act amendments, however, is sought to be used as a device to warrant future takings of private property.

B. The Availability And Adequacy Of The Tucker Act Remedy In The 3R Act Cases Does Not Justify The Rock Island Act's Taking, Where Congress Has Refused To Acknowledge Any Liability, And Where The Taking Has Been Found To Be Unconstitutional.

The misapprehension of Congress and the Appellants that the Rock Island Act's constitutional defects are cured by its oblique reference to the Tucker Act apparently rests on the Supreme Court's opinion in the 3R Act Cases. See Conference Committee Report, supra, 96 Cong. Rec. H 9931 (daily ed. Sept. 29, 1980). This misapprehension can be derived only from a superficial reading of the 3R Act Cases opinion.

The 3R Act Cases adjudicated the constitutionality of the Regional Rail Reorganization Act of 1973, 45 U.S.C. 701, et seq. (the "3R Act"). The 3R Act established a new entity, known as Conrail, to own and operate the bankrupt railroads of the Northeast.*/ The Act required the private owners of the bankrupt railroads immediately to convey their property interests to Conrail, taking in exchange Conrail securities and federally guaranteed United States Railway Association ("USRA") obligations funded by an immediate grant of $500,000,000. In addition to this grant, one billion dollars was appropriated to fund the rehabilitation and reorganization of the new rail entity. The new entity was thus initially funded with all the assets of the former private railroads, as well as federal funds in the amount of $1.5 billion.

The creditors of the railroads whose assets were to be conveyed challenged the conveyance scheme as a taking of their property in violation of their fifth amendment rights. They argued that: (1) the package of Conrail securities and USRA obligations initially funded by a Federal grant of $1.5 billion which they received in exchange for

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*/ These included the recently merged New York Central and Pennsylvania Central Railroads (Penn Central). Other private railroads included in Conrail were the Reading, Erie Lackawann, Central of New Jersey, Lehigh Valley, Boston and Maine, Ann Arbor and the Lehigh and Hudson River. For the sake of convenience, all the railroad entities merged into Conrail will be referred to in this brief as Penn Central.

their rail properties would not constitute the constitutionally required equivalent of the property conveyed -- that is, that the amount immediately appropriated as compensation for the property taken was inadequate (the "conveyance taking" issue), and (2) the continuation of rail operations pending implementation of the plan mandated by the 3R Act would result in an additional unconstitutional taking of their property through erosion beyond the constitutional limits established in Brooks-Scanlon, supra, and other cases (the "erosion taking" issue). 419 U.S. at 118.

The 3R Act did not specifically address the question whether a Tucker Act remedy would be available to the rail property owners should the compensation provided in the Act prove inadequate. The Court thus defined the major issues before it: (1) whether an action at law under the Tucker Act would be available to assure recovery for any deficiency of constitutional dimension in the compensation provided for the takings effected by the Act, and (2) if the Tucker Act remedy was available, whether it would result in adequate compensation to the rail owners. 419 U.S. at 121.

The Supreme Court held that the possibility of a later Tucker Act remedy was not withdrawn by the Act. In addition, it held that the possibility of that remedy, if it later became necessary, could adequately compensate the Penn Central owners for any "constitutional shortfall" resulting from the conveyances required, or the possible erosion of

the estate prior to conveyance. On these grounds, the Court found that the 3R Act did not work an unconstitutional taking.

The Court in 3R Act Cases pointed out that Congress clearly indicated its intent to consider the 3R Act's fairness to the Penn Central's owners and to compensate them fully both by immediately appropriating funds to back up the new securities to be exchanged for the rail properties and by authorizing the statutorily established Special Court to adjudicate and correct any defects in the plan. Congress appropriated a total of $1.5 billion in the 3R Act to assure compensation, with the Tucker Act remedy available should any shortfall occur. By contrast, Congress has declined to appropriate a penny to cover the cost of the Rock Island Act employee protection scheme. In the 3R Act conveyance to Conrail, Congress conceded the liability of the United States in the statutory scheme. In the case of the Rock Island, Congress steadfastly refuses to concede any possible liability. Thus, the question presented in the 3R Act Cases was not whether there would be any compensation by the Government, but whether the amount of compensation made available would ultimately be adequate.

Moreover, the 3R Act Cases Court made it plain that the validity of the 3R Act plan rested on its provision for full and adequate compensation to creditors. The Court stated:

> Congress has not formulated an unconstitutional reorganization plan in compelling a reorganization wherein the compensation to appellees consists of Conrail and USRA securities and other benefits 'so long as the creditor gets all the value of his lien and his share of any free assets.' RFC v. Denver & R.G.W.R. Co. [328 U.S. 495, at 533].

419 U.S. at 154-55.

The Court's determination of the plan's constitutionality also rested on the necessity of the plan to accomplish the goal of reorganizing the railroads of the Northeast. The Court commented concerning the potential "troublesome problem of procedural due process," raised by the required conveyance of property before its valuation:

> [T]he procedural sequence is vital to accomplishing the goals of the Act. If judicial review of the terms of the transfer was required before the conveyance could occur, the conveyance might well come too late to resolve the rail transportation crisis. As long as creditors are assured fair value, with interest, for their properties, the Constitution requires nothing more.

419 U.S. at 156.

Thus, the 3R Act was basically a condemnation statute: the Government took specific rail properties needed to form the new government-owned rail corporation (Conrail). Congress appropriated sums which it believed to be sufficient to compensate the former owners for their property, and the Tucker Act remedy was available to cover a shortfall -- if a shortfall should occur.

In stark contrast is the conveyance of $75,000,000 of the Rock Island's property in cash. The Rock Island Act's taking of funds, the value of which is immediately known, is thus sharply different from the conveyance of specific rail properties of unknown value to establish the Conrail entity. Here, Congress is not taking unique rail property for public use. Rather, it is requiring the expenditure of the Rock Island's private funds to achieve a perceived public purpose, which Congress could, if it chose to do so, fund directly.*/

C. The Amended Rock Island Act's Oblique Reference To The Tucker Act Indicates No Congressional Intent To Bear The Cost Of The Act's Employee Protection Program.

The 3R Act Cases Court repeatedly explained the Congressional failure to mention the availability of a Tucker Act remedy in the Conrail scheme as follows:

> Congress was so convinced that the huge sums provided would surely equal or exceed the required constitutional minimum that it never focused upon the possible need for a suit in the Court of Claims.

419 U.S. at 128. This inference affirmed the reading of legislative history and Congressional intent in the decision

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*/ Congress initially funded the similar labor protection provisions of the 3R Act with $250,000,000 given in the form of a federal grant to the new rail entity. 45 U.S.C. 775, 779. The Staggers Rail Act of 1980, Title V, Section 504, 96 Cong. Rec. H 9910 (daily ed., Sept. 29, 1980), adds $235,000,000 to this employee protection fund. This grant for funding of the similar Conrail labor protection program is particularly ironic in light of the fact that the 3R Act's labor protection grants were given to an operating railroad. See 3R Act Cases, supra, 419 U.S. at 144.

of Judge Friendly, from which the appeal was taken, In re Penn Central Transportation Company, 384 F. Supp. 895, 941 et seq. (Special Court, 1974). Thus, in the 3R Act Cases, supra, both the Congress and the Supreme Court acknowledged that compensation was owed to the Penn Central for the taking of its property.

The Court's reliance on the clear Congressional acknowledgment of liability and its initial appropriation of "huge sums" to support its finding of constitutionality highlight the fact that the Tucker Act remedy found adequate in the 3R Act Cases was to be considered only as assurance of adequate compensation should the sums appropriated prove inadequate. Thus, in the circumstances of the 3R Act case, it was reasonable for the Court to conclude that, if the package of Conrail securities, USRA obligations and "other benefits" was inadequate to compensate the railroads for the forced conveyance, a later Tucker Act remedy would assure adequate compensation.

In its June 9, 1980 grant of a preliminary injunction, the Rock Island Reorganization Court recognized the clearly disclosed Congressional intention not to compensate the Rock Island estate for sums expended under the original Rock Island Act. This reading was confirmed and accepted by Justice Stevens, who relied on the legislative history as well as the language of the Act in his opinion denying the RLEA's Motion for a Stay. Justice Stevens pointed out the

remarks of Congressman Madigan concerning the employee protection program, at 96 Cong. Rec. H 2329 (Mar. 28, 1980):

> 'There is a $75 million guaranteed obligation in this bill for labor protection payments to the Rock Island employees whose jobs are terminated. That is not an appropriation of Federal funds that will not be returned; it is a priority claim against the estate of the Rock Island Railroad, and it is structured exactly the same as the Milwaukee bill which we passed late this year.'
>
> 'At the risk of being redundant, I would like to repeat, the $750 million for the Northeast corridor is in the President's budget. The money for the Rock Island Railroad will be paid back from the estate of the Rock Island Railroad.' (Emphasis added.)

Justice Stevens explained:

> Congress rather clearly indicated its intent that the Government ultimately not to be required [sic] to underwrite any of the employee protection payments, but rather to have them imposed entirely as a burden on the Rock Island estate.

RLEA v. Gibbons, supra, 100 S. Ct. 2670, at n. 1.

Neither the Rock Island Act amendments nor their legislative history disclose any Congressional intention to repudiate this initial denial of federal compensation for the cost of the program.

The only legislative comment concerning funding of Rock Island employee protection in the Staggers Rail Act appears in the Conference Committee's Joint Explanatory Statement:

> Benefits and allowances under this arrangement shall be paid by the Rock Island Railroad and shall be treated as administrative expenses of the estate of the Rock Island Railroad. By specifically stating that there is a Tucker Act remedy, the benefits and allowances will immediately become available to the qualifying Rock Island employees and the Trustee may pursue his allegations of unconstitutional action under the Tucker Act.

96 Cong.Rec. H. 9931 (daily ed. Sept. 29, 1980).

This language indicates no Congressional admission of liability for the employee protection scheme established under the Act. Rather, it indicates once again Congressional intent to go forward with the scheme, and to deny full and immediate compensation to the Rock Island regardless of the clear unconstitutionality of the Rock Island Act.

III.

THE ROCK ISLAND ACT VIOLATES THE CONSTITUTIONAL PRINCIPLES OF DUE PROCESS, SEPARATION OF POWERS AND EQUAL PROTECTION IN SEVERAL MAJOR RESPECTS.

A. The Rock Island Act Violates The Separation Of Powers Doctrine By Directing The Reorganization Court To Impose Any Labor Protection Arrangement Ordered By The Commission On The Estate, Regardless Of The Unconstitutionality Of The Imposition.

The separation of powers doctrine dictates that Congress cannot use its general power to allocate judicial responsibility to prescribe a rule of decision in a pending case. Congress may not extend a particular jurisdictional grant and at the same time direct the courts as to the content of their decision-making process. United States v.

Klein, 80 U.S. (13 Wall.) 128 (1871). Moreover, Congress cannot selectively single out a court and retract that court's jurisdiction. See, e.g., Glidden Co. v. Zdanok, 370 U.S. 530, 568 (1962).*/

Under Section 77 of the Bankruptcy Act, 11 U.S.C. § 205(a), the district court administering the reorganization of a railroad has exclusive jurisdiction over the bankrupt railroad's property. New Haven Inclusion Cases, 399 U.S. 392, 420-21 (1970). Section 77(a) specifically provides that the reorganization court has "exclusive jurisdiction of the debtor and its property wherever located . . . ."**/

Section 106(c) of the Rock Island Act directs the reorganization court to "immediately authorize and direct the Rock Island Railroad Trustee to . . . immediately implement an arrangement [imposed by the Commission]." This grant of authority to the Commission, an agency by definition expert only in railroad operations, to direct the impositions

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*/ This basic principle, which precludes Congressional interference in pending proceedings, was applied in a pending bankruptcy proceeding in 1881. Kilbourn v. Thompson, 103 U.S. 168 (1880).

**/ Under Section 77(a), the Reorganization Court has exclusive jurisdiction over its trustee. Under Section 77(b) of the Bankruptcy Act and under Section 1171(b) of the new Bankruptcy Code, the Reorganization Court has exclusive jurisdiction to adjudicate the validity of claims and to "determine the precise contours of the priority" of existing claims against the Estate. House Report No. 95-595, 95th Cong., 1st Sess. (1977) 424. Section 77(c)(3) of the Bankruptcy Act leaves for the Reorganization Court such jurisdiction over borrowings and the issuance of trustee certificates "as might in an equity receivership be lawful."

of a debt on a bankrupt entity no longer involved in rail operation, is extraordinary indeed. It thus clearly invades the exclusive jurisdiction of the Reorganization Court over the priority of claims and assets of the bankrupt estate.

B. The Rock Island Act Unconstitutionally Singles Out the Rock Island.

The unconstitutionality of the Rock Island Act labor protection scheme as a taking and deprivation of property is accentuated by the fact that the Act singles out only one company upon which to impose its new obligations.

1. The Rock Island Act Is Special Legislation, Which Violates Due Process And Equal Protection By Discriminating Against One Railroad In Reorganization.

By singling out the Rock Island from all other companies and railroads in reorganization and imposing on it special, unprecedented burdens, the Rock Island Act clearly offends the due process and equal protection clauses of the fifth amendment.

Appellants argue that the Supreme Court has applied a presumption of validity to laws involving general "socio-economic" regulation. However, this presumption has not served to sustain acts such as the Rock Island legislation, which are "not even purportedly enacted to deal with a broad, generalized economic or social problem." Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978). Cases such as Usery v. Turner-Elkhorn, Mining Co., 428 U.S.

1 (1976), relied upon by the Milwaukee Trustee, support at most the proposition that regulation intended to effect a broad social goal may not be invalidated simply because the means employed to advance that goal incidentally disadvantages a specific generic group.

The Rock Island Act is sharply different from such legitimate regulatory schemes. The Rock Island Act is not directed to broad social goals of general applicability. Rather, the sole purpose of the Act is to mandate obligations in addition to those already in existence for the benefit of former employees of a business no longer in operation. Its effect is to alter the obligations of the Rock Island estate, as distinct from the estates of all other companies or railroads in reorganization. The Rock Island Act thus constitutes a particularized confiscation rather than legitimate regulation.

2. The Rock Island Act Constitutes An Unconstitutional Bill Of Attainder Because It Penalizes Only The Rock Island.

The Rock Island Act's labor protection scheme is the type of special punitive legislation which the constitutional prohibition of bills of attainder was designed to prevent. It penalizes the Rock Island for exercising its constitutional and statutory right to withdraw from losing railroad operations by imposing only upon the Rock Island extraordinary labor protection burdens. Bills of attainder are:

> [l]egislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial.

United States v. Lovett, 328 U.S. 303, 315 (1946). See also, e.g., United States v. Brown, 381 U.S. 437 (1965), Nixon v. Administrator of General Services, 443 U.S. 425, 475 (1976).

The Rock Island Act, in imposing special punitive labor protection costs on one named entity--the Rock Island estate--in derogation of the Reorganization Court's exclusive jurisdiction over the Rock Island estate, is clearly a bill of attainder.

C. The Rock Island Act Further Violates The Due Process And Separation Of Powers Principles By Its Extraordinary Curtailment Of Appellate Review.

The Rock Island Act violates the due process and separation of powers principles in one final major respect, by its extraordinary limitations on appellate review. The Staggers Rail Act amendment to Section 124 of the Rock Island Act appears to require that review of the Rock Island Act, as amended, occur before this Court within 60 days, despite the fact that an appeal as to the basic constitutional questions concerning the Rock Island Act scheme is already pending before the Supreme Court. Moreover, Section 124(a) appears to require that this proceeding be consolidated with the pending proceeding concerning the unrelated MRRA labor protection scheme.

If the unusual procedure required by Section 124(a) of the amended Rock Island Act was intended to strip the Supreme Court of its jurisdiction over a pending case, because the denials by Justice Stevens and the Court of the RLEA's stay motion reflected a sense in the Supreme Court that the Rock Island Act is unconstitutional, the principles of United States v. Klein, supra are violated.

This Congressional exercise in forum shopping has already resulted in extraordinary infringements of the rights of the Rock Island estate. Rather than permitting rational review of the Rock Island Act, the Act seeks to strip the Supreme Court of its proper appellate jurisdiction over a case pending under 28 U.S.C. § 1252. It appears to require this Court to assume jurisdiction to review (should it agree to do so) the subsidiary order of October 15, 1980 in a piecemeal fashion. Moreover, participation in these appeals by the Milwaukee Road Trustee has forced the Rock Island Trustee, creditors and shareholders to confront the Milwaukee Road Trustee as an adversary, although the Milwaukee Road case is wholly unrelated to the Rock Island situation, and the parties in the Milwaukee Road appeal did not participate in the proceedings before the Rock Island Reorganization Court. Finally, the extraordinary requirement that these

appeals be heard in an en banc proceeding, and determined within 60 days of the date the last appeal was filed, (exacerbated by the tardy filing of briefs by the Appellants) has resulted in a wholly inadequate period for briefing and argument of these appeals, including the preliminary matters to be addressed. The sum effect of this extraordinary Congressional interference with pending litigation has resulted in the procedural confusion surrounding these proceedings. The inevitable result is a further infringement of the constitutional rights of the Rock Island estate.

IV.

THE ROCK ISLAND ACT VIOLATES THE CONSTITUTIONAL REQUIREMENT THAT BANKRUPTCY LAWS BE UNIFORM.

Article I, Section 8, clause 4 of the United States Constitution provides that:

> The Congress shall have the power . . . to establish . . . uniform laws on the subject of Bankruptcies throughout the United States. (Emphasis supplied.)

This clause requires that legislation "on the subject of bankruptcies" must apply equally to all similar bankruptcies throughout the country.*/ In Hanover National Bank v.

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*/ The Supreme Court, in Continental Illinos National Bank and Trust Company v. Chicago, Rock Island and Pacific Ry. Co., 294 U.S. 648 (1935), stated that the "subject of bankruptcies" involves:

> [N]othing less than 'the subject of the relations between an insolvent or nonpaying

[Footnote continued on next page.]

Moyses, 186 U.S. 181, 188 (1902), the Supreme Court emphasized that "[t]he laws passed on the subject [of bankruptcies] must . . . be uniform throughout the United States. . . ."

In the 3R Act Cases, supra, the Supreme Court held the Regional Rail Reorganization Act of 1973 to be valid against a non-uniformity challenge. On its face, the 3R Act applied to railroad reorganizations in only a single, statutorily defined region. Despite discussion of the need to remedy geographically isolated conditions, the Court ultimately found that:

> No railroad reorganization proceeding, within the meaning of the [3R Act], was pending outside that defined region on the effective date of the Act or during the 180-day period following the statute's effective date. Thus, the [3R Act] in fact operates uniformly upon all bankrupt railroads then operating in the United States and uniformly with respect to all creditors of each of these railroads. (Emphasis supplied.)

419 U.S. at 159-160. Thus, nationwide geographic uniformity was de facto present under the 3R Act, and this factor was

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[Footnote continued from preceding page.]

> or fraudulent debtor, and his creditors, extending to his and their relief.' Id. at 673 quoting from In re Reiman 29 Fed. Cas. 490, 496-97 (19); see also Wright v. Union Central Life Insurance Company, 304 U.S. 502, 513-14 (1938).

The Rock Island Act is certainly bankruptcy legislation subject to the uniformity clause, because it involves the priority and use of government loans, the imposition of new debt on the debtor's estate, and the treatment of labor protection claims.

central to the findings in both the Special Court and the Supreme Court that the 3R Act did not violate the uniformity clause.*/

Unlike the 3R Act, the Rock Island Act is explicitly tailored and applicable to only one rail carrier in the process of reorganization and liquidation. Further, the Rock Island is treated differently from the Milwaukee Road, a Section 77 reorganization in the same judicial district. The de facto geographic uniformity which insulated the 3R Act from the effect of the uniformity clause cannot justify the unequal treatment of the Rock Island. The Rock Island

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*/ In his opinion for the Special Court, Judge Friendly explained that:

> 'The uniformity required by Article I, § 8, Clause 4, is geographical, not temporal. Cf. Hanover Nat'l Bank v. Moyses, supra. If the Act had been written to apply only to railroads that were in proceedings for reorganization under § 77 on the date of its enactment, objection on the ground of lack of uniformity would not have been even arguable. While the Act does not say in ipsissimis verbis that it applies only to such railroads, § 207(b) and the elaborate timetable provided in the Act make plain that such was the intent of Congress. Every such railroad was within the region defined in § 102(13) of the Act . . . .'

In the Matter of Penn Central Transportation Co., 384 F. Supp. 895, 916 (Special Ct., 1974).

The Supreme Court shared Judge Friendly's view:

> 'The argument that the Rail Act differs from the head tax statute because by its

[Footnote continued on following page.]

Act is unquestionably the narrowest piece of bankruptcy legislation imaginable.

In In re Sink, 27 F.2d 361 (W.D. Va. 1928), appeal dismissed, 30 F.2d 1019 (4th Cir. 1929), a law dealing with a single bankrupt and authorizing action by a single Federal district court was invalidated as a violation of the uniformity clause. The Sink court declared:

> Article 1, § 8, cl. 4, of the federal Constitution provides that Congress shall have the power to establish uniform laws on the subject of bankruptcies throughout the United States. A power to enact laws on the subject of 'bankruptcies' does not literally include the power to enact laws relating to a single bankruptcy. And that it was not the intention of the provision in question to give Congress power to so legislate, is clearly shown by the use of the word 'uniform.' In order that a bankruptcy statute shall be uniform it must apply to all bankruptcies. And a statute which applies to only one bankruptcy is as far from being uniform as is possible. It may further be said that every possible reason for using the two words in question is frustrated by a statute relating only to an individual bankruptcy.

27 F.2d at 361.

Thus, the Sink case is directly on point; and there can be no doubt that the Rock Island Act, as special

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[Footnote continued from preceding page.]

> own terms the Rail Act applies only to one designated region is without merit. The definition of the region does not obscure the reality that the legislation applies to all railroads under reorganization pursuant to § 77 during the time the Act applies.'

419 U.S. at 161 (emphasis supplied).

legislation directed to only one railroad in reorganization, is an unconstitutional non-uniform law on the subject of bankruptcy.*/

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*/ The Milwaukee Trustee's argument that the Sink court found the special legislation "non-uniform not because it applied to a single bankrupt, but because it vested special power exclusively in the district court for one geographic region" (Milw. Trustee Br. at 56), is clearly contrary to the explicit language of the case. The Sink Court's reference to the fact that the Sink statute applied only to one court or one judicial district indicates an additional reason why the act violates the uniformity clause.

CONCLUSION

For the foregoing reasons, the Trustee, creditors and shareholders respectfully request this Court to affirm the district court's Order of October 15, 1980.

Respectfully submitted,

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November 10, 1980

APPENDIX G

GENERAL BALANCE SHEETS AND INCOME STATEMENTS

1975–1979

WILLIAM M. GIBBONS, TRUSTEE OF
CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, DEBTOR

General Balance Sheet as of December 31, 1975
in Accordance with Regulations of the Interstate Commerce Commission

ASSETS

CURRENT ASSETS	
701 - Cash	$ (1,322,478)
702 - Temporary cash investments	22,144,790
703 - Special deposits	4,698,433
705 - Traffic and car service balances, Dr.	4,445,889
706 - Net balance receivable from agents and conductors	9,371,886
707 - Miscellaneous accounts receivable	5,855,864
708 - Interest and dividends receivable	51,971
709 - Accrued accounts receivable	16,447,516
710 - Working fund advances	127,950
711 - Prepayments	1,452,033
712 - Material and supplies	22,388,804
713 - Other current assets	487,196
Total Current Assets	$ 86,249,854
SPECIAL FUNDS	
715 - Sinking Funds	$ -
716 - Capital and other reserve funds	604,689
717 - Insurance and other funds	-
Total Special Funds	$ 604,689
INVESTMENTS	
721 - Investments in affiliated companies	$ 17,882,630
722 - Other investments	1,239
Total Investments	$ 17,883,869
PROPERTIES	
731 - Road and equipment property	$502,154,345
732 - Improvements on leased property	1,933,927
Total Transportation Property	$504,088,272
733 - Accrued depreciation - Improvements on leased property	(309,949)
735 - Accrued depreciation - road and equipment	(173,469,923)
736 - Amortization of defense projects - road and equipment	(2,379,013)
Total Transportation Property Less Recorded Depreciation and Amortization	$327,729,387
737 - Miscellaneous physical property	4,458,510
738 - Accrued depreciation - miscellaneous physical property	(1,051,605)
Miscellaneous Physical Property Less Recorded Depreciation	$ 3,406,905
Total Properties Less Recorded Depreciation and Amortization	$331,136,292
OTHER ASSETS AND DEFERRED CHARGES	
741 - Other assets	$ 2,320,290
742 - Unamortized discount on long-term debt	686,923
743 - Other deferred charges	2,144,127
Total Other Assets and Deferred Charges	$ 5,151,340
Total Assets	$441,126,044

( ) Denotes credit

Note: In conformity with Order 42 issued by the United States District Court for the Northern District of Illinois - Eastern Division, No. 758-2697, the following special deposits in trust for the United States were made on the dates shown:

Federal Tax Withholding	$ 826,747.25	-	December 15, 1975
Federal Retirement Tax	231,305.01	-	December 15, 1975
Federal Tax Withholding	159,093.70	-	December 19, 1975
Federal Retirement Tax	46,499.10	-	December 19, 1975
Federal Tax Withholding	869,911.05	-	December 31, 1975
Federal Retirement Tax	301,798.65	-	December 31, 1975
Total:	$2,435,354.76		

WILLIAM M. GIBBONS, TRUSTEE OF
CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, DEBTOR

General Balance Sheet as of December 31, 1975
In Accordance with Regulations of the Interstate Commerce Commission

LIABILITIES

CURRENT LIABILITIES		
752 - Traffic and car service balances, Cr.	$	1,240,358
753 - Audited accounts and wages payable		6,890,638
754 - Miscellaneous accounts payable		2,520,201
755 - Interest matured unpaid		7,084
756 - Dividends matured unpaid		-
757 - Unmatured interest accrued		63,883
759 - Accrued accounts payable		40,053,931
760 - Federal income taxes accrued		-
761 - Other taxes accrued		2,645,695
763 - Other current liabilities		4,008,098
Total Current Liabilities	$	57,429,888
LONG-TERM OBLIGATIONS DUE WITHIN ONE YEAR		
764 - Equipment obligations	$	1,302,789
LONG-TERM DEBT		
765 - Funded debt unmatured in hands of public	$	-
766 - Equipment obligations		3,582,335
768 - Debt in default		100,462,028
769 - Amounts payable to affiliated companies		1,071,523
Total Long-Term Debt	$	105,115,886
RESERVES		
771 - Pension and welfare reserves	$	560,000
774 - Casualty and other reserves		6,636,366
Total Reserves	$	7,196,366
OTHER LIABILITIES AND DEFERRED CREDITS		
781 - Interest in default	$	1,847,575
782 - Other liabilities (under reorganization proceedings)		70,929,590
782 - Other liabilities		13,028,105
784 - Other deferred credits		8,724,314
785 - Accrued liability - leased property		97,414
Total Other Liabilities and Deferred Credits	$	94,612,998
SHAREHOLDERS' EQUITY		
791 - Capital stock	$	146,058,050
798 - Retained income - unappropriated		25,586,398
Total Shareholders' Equity	$	171,644,448
Total Liabilities and Shareholders' Equity	$	437,302,375

Certified Correct:

Victor C. Blue
Comptroller

NOTE: The company's results of operations are included in Retained Income without adjustment which ultimately may result from company's entry into reorganization under the Bankruptcy Act on March 17, 1975. The obligations classified above as being in default are so classifed only because on March 17, 1975, the company filed a petition seeking reorganization under the Bankruptcy Act, which action is defined as an event of default in the instruments under which the obligations were issued.

March 12, 1976 - Audited

WILLIAM M. GIBBONS, TRUSTEE OF
CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, DEBTOR

Income Statement
in Accordance with Regulations of the Interstate Commerce Commission

December 1975		January 1 to December 31 1975
	REVENUES	
$26,153,925	Freight	$301,575,426
460,350	Passenger	5,011,487
1,669,121	Other	14,983,997
28,283,396	Railway Operating Revenues	321,570,910
	EXPENSES	
5,031,621	M.of W.& S. Excl. Deprn.	40,644,955
227,534	Depreciation	2,734,492
4,643,049	M.of Equip. Excl. Deprn.	52,902,435
476,376	Depreciation	5,478,716
608,989	Traffic	7,439,032
5,889,941	Transportation	144,886,293
35,552	Dining Car Operations	389,769
1,359,258	General	13,605,184
18,272,320	Railway Operating Expenses	270,080,876
10,011,076	NET REVENUE FROM RAILWAY OPERATIONS	51,490,034
	RAILWAY TAX ACCRUALS (Excl. Income)	
238,349	General	6,111,285
147,940	Railroad Unemployment Insurance	1,885,416
1,622,970	Railroad Retirement	20,383,963
2,009,259	Total	28,380,664
	RENTS-DEBIT BALANCE	
494,139	Equipment - Time & Mileage	3,685,182
582,635	Private Carline Mileage	7,490,946
3,310,884	Other	36,617,262
178,496	Joint Facility	2,433,939
4,566,154	Total Rents	54,227,329
3,435,663	NET RAILWAY OPERATING INCOME	(31,117,959)
367,887	Non-Operating Income	4,549,492
(166,613)	Equity in earnings (losses) of affiliated companies	(655,747)
328,545	Miscellaneous Deductions from Income	676,880
3,308,392	INCOME AVAILABLE FOR FIXED CHARGES	(27,901,094)
196,018	Fixed Charges	2,331,796
-	Contingent Interest	-
3,112,374	INCOME (LOSS) BEFORE EXTRAORDINARY ITEMS	(30,232,890)
	EXTRAORDINARY ITEMS	
-	Loss on Derailment, Des Moines, Iowa	(933,016)
$3,112,374	NET INCOME (LOSS)	$(31,165,906)

Certified Correct:

Walter C Bohne
Comptroller

Notes:

1. The Company's results of operations are included in Retained Income without adjustment which ultimately may result from Company's entry into reorganization under the Bankruptcy Act on March 17, 1975.

2. Revaluation of assets as a result of possible permanent impairment and other adjustments which may be required as a result of examination and audit of the accounts are not reflected in this statement.

WILLIAM M. GIBBONS, TRUSTEE OF
CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, DEBTOR (G-4)

GENERAL BALANCE SHEET AS OF DECEMBER 31, 1976
IN ACCORDANCE WITH REGULATIONS OF THE INTERSTATE COMMERCE COMMISSION

ASSETS

CURRENT ASSETS	
701 - Cash	$ (396,953)
702 - Temporary cash investments	20,016,362
703 - Special deposits	1,853,923
705 - Traffic and car service balances, Dr.	-
706 - Net balance receivable from agents and conductors	9,855,502
707 - Miscellaneous accounts receivable	4,974,604
708 - Interest and dividends receivable	21,583
709 - Accrued accounts receivable	15,246,873
710 - Working fund advances	126,826
711 - Prepayments	2,149,095
712 - Material and supplies	25,632,929
713 - Other current assets	541,758
Total Current Assets	$ 80,022,502
SPECIAL FUNDS	
715 - Sinking Funds	$ -
716 - Capital and other reserve funds	5,345,966
717 - Insurance and other funds	-
Total Special Funds	$ 5,345,966
INVESTMENTS	
721 - Investments in affiliated companies	$ 16,512,693
722 - Other investments	1,239
Total Investments	$ 16,513,932
PROPERTIES	
731 - Road and equipment property	$501,014,159
732 - Improvements on leased property	1,906,299
Total Transportation Property	$502,920,458
733 - Accrued depreciation - improvements on leased property	$ (533,587)
735 - Accrued depreciation - road and equipment	(176,586,846)
736 - Amortization of defense projects - road and equipment	(2,179,715)
Total Transportation Property Less Recorded Depreciation and Amortization	$323,620,310
737 - Miscellaneous physical property	4,449,040
738 - Accrued depreciation - miscellaneous physical property	(1,057,619)
Miscellaneous Physical Property Less Recorded Depreciation	$ 3,391,421
Total Properties Less Recorded Depreciation and Amortization	$327,011,731
OTHER ASSETS AND DEFERRED CHARGES	
741 - Other assets	$ 8,556,450
742 - Unamortized discount on long-term debt	628,880
743 - Other deferred charges	5,208,552
Total Other Assets and Deferred Charges	$ 14,393,882
Total Assets	$443,288,013

( ) Denotes credit

NOTE: In conformity with Order No. 42 issued by the United States District Court for the Northern District of Illinois-Eastern Division, No. 75B-2697, the following special deposits in trust for the United States were made on the dates shown:

Federal Withholding Tax	$1,044,572.81	December 15, 1976
Federal Retirement Tax	294,152.04	December 15, 1976
Federal Withholding Tax	1,042,953.64	December 30, 1976
Federal Retirement Tax	350,176.76	December 30, 1976
	$2,731,855.25	

WILLIAM M. GIBBONS, TRUSTEE OF
CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, DEBTOR (G-5)

GENERAL BALANCE SHEET AS OF DECEMBER 31, 1976
IN ACCORDANCE WITH REGULATIONS OF THE INTERSTATE COMMERCE COMMISSION

LIABILITIES

CURRENT LIABILITIES	
752 - Traffic and car service balances, Cr.	$ 2,500,553
753 - Audited accounts and wages payable	9,896,891
754 - Miscellaneous accounts payable	2,954,572
755 - Interest matured unpaid	7,950
756 - Dividends matured unpaid	-
757 - Unmatured interest accrued	274,424
759 - Accrued accounts payable	44,651,122
760 - Federal income taxes accrued	-
761 - Other taxes accrued	5,922,960
763 - Other current liabilities	5,409,821
Total Current Liabilities	$ 71,618,293
LONG-TERM OBLIGATIONS DUE WITHIN ONE YEAR	
764 - Equipment obligations	$ 1,585,366
LONG-TERM DEBT	
765 - Funded debt unmatured in hands of public	$ -
766 - Equipment obligations	3,042,076
767 - Receivers' and Trustees' Securities	9,393,491
768 - Debt in default	100,462,028
769 - Amounts payable to affiliated companies	1,084,795
Total Long-Term Debt	$113,982,390
RESERVES	
771 - Pension and welfare reserves	$ 680,000
774 - Casualty and other reserves	9,061,205
Total Reserves	$ 9,741,205
OTHER LIABILITIES AND DEFERRED CREDITS	
781 - Interest in default	$ 4,304,756
782 - Other liabilities (under reorganization proceedings)	67,045,992
782 - Other liabilities	17,225,093
784 - Other deferred credits	11,098,318
785 - Accrued liability - leased property	89,539
Total Other Liabilities and Deferred Credits	$ 99,763,698
SHAREHOLDERS' EQUITY	
791 - Capital stock	$146,058,050
798 - Retained income - unappropriated	539,011
Total Shareholders' Equity	$146,597,061
Total Liabilities and Shareholders' Equity	$443,288,013

Certified Correct:

Victor C. Bohne
Comptroller

Notes:

1. The Company's results of operations are included in Retained Income without adjustment which ultimately may result from Company's entry into reorganization under the Bankruptcy Act on March 17, 1975. The obligations classified above as being in default are so classified only because on March 17, 1975, the company filed a petition seeking reorganization under the Bankruptcy Act, which action is defined as an event of default in the instruments under which the obligations were issued.

2. Adjustments normally made in year-end closing of accounts, revaluation of assets as a result of possible permanent impairment and other adjustments which may be required as a result of examination and audit of the accounts are not reflected in this statement.

February 11, 1977

WILLIAM M. GIBBONS, TRUSTEE OF
CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, DEBTOR (G-6)

Income Statement
in Accordance with Regulations of the Interstate Commerce Commission

	DECEMBER 1976			
	Operations Exclusive of Rehabilitation Programs	Rehabilitation Programs	Total	1975
REVENUES				
Freight	$26,334,218	$ -	$26,334,218	$26,153,925
Passenger	376,687	-	376,687	460,350
Other	1,792,141	-	1,792,141	1,669,121
Railway Operating Revenues	28,503,046	-	28,503,046	28,283,396
EXPENSES				
M.of W.& S. Excl. Depreciation	4,106,986	1,852,108	5,959,094	5,031,621
Depreciation	230,455	-	230,455	227,534
M.of Equip. Excl. Depreciation	5,136,166	297,111	5,433,277	4,643,049
Depreciation	426,879	-	426,879	476,376
Traffic	598,338	-	598,338	608,989
Transportation	13,014,186	-	13,014,186	5,889,941
Dining Car Operations	32,165	-	32,165	35,552
General	1,148,695	-	1,148,695	1,359,258
Railway Operating Expenses	24,693,870	2,149,219	26,843,089	18,272,320
NET REVENUE FROM RAILWAY OPERATIONS	3,809,176	(2,149,219)	1,659,957	10,011,076
RAILWAY TAX ACCRUALS (Excl. Income)				
General	80,581	-	80,581	238,349
Railroad Unemployment Insurance	182,556	20,656	203,212	147,940
Railroad Retirement	1,775,426	200,976	1,976,402	1,622,970
Total	2,038,563	221,632	2,260,195	2,009,259
RENTS-DEBIT BALANCE				
Equipment - Time and Mileage	689,764	-	689,764	494,139
Private Carline Mileage	711,011	-	711,011	582,635
Other	3,478,992	-	3,478,992	3,310,884
Joint Facility	199,860	-	199,860	178,496
Total Rents	5,079,627	-	5,079,627	4,566,154
NET RAILWAY OPERATING INCOME	(3,309,014)	(2,370,851)	(5,679,865)	3,435,663
Non-Operating Income	791,400	-	791,400	367,887
Equity in Earnings (Losses) of Affiliated Companies	126,253	-	126,253	(166,613)
Miscellaneous Deductions from Income	155,854	-	155,854	328,345
INCOME AVAILABLE FOR FIXED CHARGES	(2,547,215)	(2,370,851)	(4,918,066)	3,308,392
Fixed Charges	268,852	-	268,852	196,018
Contingent Interest	-	-	-	-
NET INCOME (LOSS)	$(2,816,067)	$(2,370,851)	$(5,186,918)	$ 3,112,374

Certified Correct:

Walter C Blum
Comptroller

Notes:

1. The Company's results of operations are included in Retained Income without adjustment which ultimately may result from Company's entry into reorganization under the Bankruptcy Act on March 17, 1975.

2. Revaluation of assets as a result of possible permanent impairment and other adjustments which may be required as a result of examination and audit of the accounts are not reflected in this statement.

WILLIAM M. GIBBONS, TRUSTEE OF
CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, DEBTOR
General Balance Sheet as of December 31, 1977

ASSETS

CURRENT ASSETS	
701 - Cash	$ (460,775)
702 - Temporary cash investments	16,843,455
703 - Special deposits	1,843,340
705 - Traffic and car service balances, Dr.	—
706 - Net balance receivable from agents and conductors	11,076,106
707 - Miscellaneous accounts receivable	8,716,386
708 - Interest and dividends receivable	22,534
709 - Accrued accounts receivable	15,971,155
710 - Working fund advances	126,726
711 - Prepayments	2,020,216
712 - Material and supplies	13,482,718
713 - Other current assets	543,566
Total Current Assets	$70,205,427
SPECIAL FUNDS	
715 - Sinking Funds	$ —
716 - Capital and other reserve funds	8,246,805
717 - Insurance and other funds	—
Total Special Funds	$ 8,246,805
INVESTMENTS	
721 - Investments in affiliated companies	$15,587,092
722 - Other investments	1,154
Total Investments	$15,588,246
PROPERTIES	
731 - Road and equipment property	$708,618,034
732 - Improvements on leased property	3,683,026
Total Transportation Property	$712,301,060
733 - Accrued deprn. - improvements on leased property	$ (2,189,522)
735 - Accrued deprn. - road and equipment	(351,248,018)
736 - Amortization of defense projects - road and equipment	(1,878,431)
Total Transportation Property Less Recorded Depreciation and Amortization	$356,985,089
737 - Miscellaneous physical property	4,449,952
738 - Accrued depreciation - misc. physical property	(1,109,610)
Miscellaneous Physical Property Less Recorded Deprn.	$ 3,340,342
Total Properties Less Recorded Deprn. and Amort.	$360,325,431
OTHER ASSETS AND DEFERRED CHARGES	
741 - Other assets	$ 5,006,196
742 - Unamortized discount on long-term debt	—
743 - Other deferred charges	5,219,742
Total Other Assets and Deferred Charges	$ 10,225,938
Total Assets	$464,631,847

( ) Denotes credit

NOTE: In conformity with Order No. 42 issued by the United States District Court for the northern district of Illinois-Eastern Division, No. 73B-2697, the following special deposits in trust for the United States were made on the dates shown:

FEDERAL WITHHOLDING TAX	$ 1,047,430.82	December 13, 1977
FEDERAL RETIREMENT TAX	287,023.89	December 13, 1977
FEDERAL WITHHOLDING TAX	1,056,224.43	December 28, 1977
FEDERAL RETIREMENT TAX	348,653.00	December 28, 1977
	$ 2,739,332.14	

WILLIAM M. GIBBONS, TRUSTEE OF
CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, DEBTOR
General Balance Sheet as of December 31 , 1977

LIABILITIES

CURRENT LIABILITIES	
752 - Traffic and car service balances, Cr.	$ 5,141,244
753 - Audited accounts and wages payable	6,508,430
754 - Miscellaneous accounts payable	8,133,242
755 - Interest matured unpaid	7,668
756 - Dividends matured unpaid	—
757 - Unmatured interest accrued	633,568
759 - Accrued accounts payable	43,355,158
760 - Federal income taxes accrued	—
761 - Other taxes accrued	5,744,572
763 - Other current liabilities	8,766,411
Total Current Liabilities	$ 78,290,313
LONG-TERM OBLIGATIONS DUE WITHIN ONE YEAR	
764 - Equipment obligations	$ 1,608,409
LONG-TERM DEBT	
765 - Funded debt unmatured in hands of public	$ --
766 - Equipment obligations	1,824,612
767 - Receivers' and Trustees' Securities	16,938,917
768 - Debt in default	100,462,028
769 - Amounts payable to affiliated companies	1,284,784
770.1 - Unamortized discount on long term debt	(371,483)
Total Long-Term Debt	$ 119,938,858
RESERVES	
771 - Pension and welfare reserves	$ 712,959
774 - Casualty and other reserves	11,152,192
Total Reserves	$ 11,865,151
OTHER LIABILITIES AND DEFERRED CREDITS	
781 - Interest in default	$ 6,462,093
782 - Other liabilities	15,137,960
782 - Other Liabilities (under reorganization proceedings)	
Incurred prior to reorganization	57,774,363
Incurred subsequent to reorganization	10,097,484
784 - Other deferred credits	12,414,344
785 - Accrued Liability - leased property	93,154
Total Other Liabilities and Deferred Credits	$ 101,941,708
SHAREHOLDER'S EQUITY	
791 - Capital stock	$ 146,058,050
798 - Retained income - unappropriated	4,929,658
Total Shareholders' Equity	$ 150,987,708
Total Liabilities and Shareholders' Equity	$ 464,631,347

Certified Correct:

Victor C. Bohna
Comptroller

NOTE: The Company's results of operations are included in Retained Income without adjustment which ultimately may result from Company's entry into reorganization under the Bankruptcy Act on March 17, 1975. The obligation classified above as being in default are so classified only because on March 17, 1975, the company filed a petition seeking reorganization under the Bankruptcy Act, which action is defined as an event of default in the instruments under which the obligations were issued.

WILLIAM [illegible], TRUSTEE OF
CHICAGO, ROCK ISLAND AND [illegible] RAILROAD COMPANY, DEBTOR

INCOME STATEMENT

	TWELVE MONTHS ENDED DEC. 31, 1977	DEC. 31, 1976
REVENUES		
Freight	$317,037,473	$ 317,750,925
Passenger	4,681,113	4,761,832
Other	21,252,621	18,807,301
Railway Operating Revenues	342,971,217	341,320,058
EXPENSES		
M.of W.& S. Excl. Depreciation	37,611,020	29,837,662
Depreciation	13,434,409	12,892,589
M.of Equip. Excl. Depreciation	56,667,790	50,557,050
Depreciation	5,141,376	5,199,795
Traffic	7,458,975	7,279,877
Transportation	159,121,710	148,596,733
Dining Car Operations	198,325	212,176
General	16,259,648	15,530,097
Railway Operating Expenses	295,951,453	270,125,979
NET REVENUE FROM RAILWAY OPERATIONS	47,019,764	71,194,079
RAILWAY TAX ACCRUALS (Excl. Income)		
General	3,701,473	5,543,872
Railroad Unemployment Insurance	3,349,798	2,331,404
Railroad Retirement	21,468,074	20,491,867
Total	28,519,347	28,367,143
RENTS-DEBIT BALANCE		
Equipment - Time and Mileage	8,822,094	8,321,999
Private Carline Mileage	8,749,588	7,415,624
Other	43,313,617	38,395,518
Joint Facility	1,327,811	2,486,283
Total Rents	62,213,110	56,619,424
NET RAILWAY OPERATING INCOME	(23,732,693)	(14,092,488)
Non-Operating Income	8,900,040	4,279,023
Equity in Earnings (Losses) of Affiliated Companies	(1,194,837)	(40,774)
Miscellaneous Deductions from Income	754,610	1,670,041
INCOME AVAILABLE FOR FIXED CHARGES	(16,772,300)	(11,524,270)
Fixed Charges	3,320,307	2,499,498
Contingent Interest		
NET INCOME (LOSS) Before Extraordinary Items	(20,093,107)	(14,024,274)
Cumulative effect on pr.yrs.(thru 12/31/75) of change in method of acctg.for trk.struc.		13,460,441
NET INCOME (LOSS)	$(20,093,107)	$ (563,833)

Certified Correct:

Victor C. Bohne
Comptroller

Note: The Company's results of operations are included in Retained Income without adjustment which adjustment may result from Company's entry into reorganization under the Bankruptcy Act on March 17, 1975.

February 21, 1978

WILLIAM H. GIBBONS, TRUSTEE OF
CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY, DEBTOR

General Balance Sheet as of December 31, 1978

ASSETS

CURRENT ASSETS		
701 - Cash		$ (4,617,086)
702 - Temporary cash investments		21,102,305
703 - Special deposits		2,154,321
705 - Accounts Receivable; interline and other balances		-
706 - Accounts Receivable; customers		14,873,402
707 - Accounts Receivable; other		7,689,634
708 - Interest and dividends receivable		32,161
708.5 - Receivables from affiliated companies		247,834
709 - Accrued accounts receivable		21,798,433
709.5 - Allowance for uncollectible accounts		(125,000)
710 - Working fund advances		129,346
711 - Prepayments	$ 2,580,041	
Capitalized Equip leases; non-recourse	338,000	2,918,041
712 - Material and supplies		16,238,531
713 - Other current assets		485,401
Total Current Assets		$ 82,897,323
SPECIAL FUNDS		
715 - Sinking Funds		$ -
716 - Capital Funds		9,169,767
717 - Insurance and other funds		-
Total Special Funds		$ 9,169,767
INVESTMENTS		
721 - Investments and advances; Affiliated companies		$ 15,926,390
721.5 - Adj; other investments and advances Affiliated Co's		(695,956)
722 - Other investments and advances		1,154
Total Investments and Advances		$ 15,231,588
PROPERTIES		
731 - Road and equipment property	$ 714,305,260	$ -
Capitalized equipment leases; non-recourse	121,523,000	$ 835,828,260
732 - Improvements on leased property		3,683,026
Total Transportation Property		$ 839,511,286
733 - Accumulated depreciation - improvmt on leased prpty		$ (2,313,144)
735 - Accumulated depreciation;		
Road and equipment	$(357,735,894)	-
Capitalized equipment leases; non-recourse	(43,370,000)	$(401,105,894)
736 - Amortization of defense projects - road and equipment		(1,855,121)
Total Transportation Property Less Recorded Depreciation and Amortization		$ 434,237,127
737 - Property used in other than carrier operations		4,477,271
738 - Accumltd deprn; prpty used in other than carrier oprns.		(1,135,526)
Prpty used in other than carrier oprns less Recorded Depreciation		$ 3,341,745
Total Properties Less Recorded Depreciation and Amortization		$ 437,578,872
OTHER ASSETS AND DEFERRED CHARGES		
739 - Organization Expenses		$ -
741 - Other assets		8,233,008
743 - Other deferred charges		5,348,180
Total Other Assets and Deferred Charges		$ 13,581,188
Total Assets		$ 558,458,738

( ) Denotes credit

Note: 1. In conformity with Order No. 42 issued by the United States District Court for the Northern District of Illinois-Eastern Division, No.75B-2697, the following special deposits in trust for the United States were made on the dates shown:

Federal Withholding Tax	$ 1,353,678.82	December 13, 1978
Federal Retirement Tax	130,411.27	December 13, 1978
Federal Withholding Tax	1,246,193.49	December 28, 1978
Federal Retirement Tax	414,609.15	December 28, 1978
	$ 3,144,892.73	

/bjc-6

WILLIAM M. GIBBONS, TRUSTEE OF
CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, DEBTOR

General Balance Sheet as of December 31, 1978

LIABILITIES

CURRENT LIABILITIES			
752 - Accounts payable; interline and other balances			$ 4,425,074
753 - Audited accounts and wages payable			9,375,478
754 - Accounts payable: other			7,305,919
755 - Interest and dividends payable	$ 777,552		
Capitalized equipment leases: non-recourse	1,351,000		2,128,552
756 - Dividends payable			-
757 - Payables to affiliated companies			-
759 - Accrued accounts payable			54,309,401
760 - Federal income taxes accrued			-
761.5 - Other taxes accrued			7,564,820
763 - Other current liabilities			16,295,429
Total Current Liabilities			$ 101,404,673
LONG-TERM OBLIGATIONS DUE WITHIN ONE YEAR			
764 - Equipment obligations	$1,088,981		
Capitalized equipment leases: non-recourse	6,575,000		$ 7,663,981
LONG-TERM DEBT			
765 - Funded debt unmatured			$ -
766 - Equipment obligations			1,287,919
766.5 - Capitalized lease obligations			83,529,000
767 - Receivers' and Trustees' Securities			21,091,993
768 - Debt in default			100,462,028
769 - Accounts payable; affiliated companies			1,313,180
770.1 - Unamortized debt discount			-
Total Long-Term Debt			$ 207,684,120
RESERVES			
771 - Accrued liability; pension and welfare			$ 809,245
772 - Accrued liability; leased property			96,755
774 - Accrued liability; casualty and other claims			12,087,620
Total Reserves			$ 12,993,620
OTHER LIABILITIES AND DEFERRED CREDITS			
781 - Interest in default			$ 16,900,926
782 - Other liabilities			8,433,993
782 - Other liabilities (under reorganization proceedings)			
Incurred prior to reorganization			56,111,035
Incurred subsequent to reorganization			11,838,050
784 - Other deferred credits			11,339,635
Total Other Liabilities and Deferred Credits			$ 104,623,639
SHAREHOLDERS' EQUITY			
791 - Capital stock			$ 146,058,050
798 - Retained income - unappropriated			(21,969,345)
Total Shareholders' Equity			$ 124,088,705
Total Liabilities and Shareholders' Equity			$ 558,458,738

Certified Correct:

Victor C. Bohne
Comptroller

Note: 1. The Company's results of operations are included in Retained Income without adjustment which ultimately may result from Company's entry into reorganization under the Bankruptcy Act on March 17, 1975. The obligation classified above as being in default are so classified only because on March 17, 1975, the company filed a petition seeking reorganization under the Bankruptcy Act, which action is defined as an event of default in the instruments under which the obligations were issued.

/bjc-6

WILLIAM N. GIBBONS, TRUSTEE OF
CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, DEBTOR
INCOME STATEMENT

	December 1978	Year 1978	Restated * 1977
REVENUES			
Freight	$27,326,020	$363,749,170	$337,037,478
Passenger	430,900	5,041,932	4,681,118
Other	2,007,748	20,824,396	21,252,621
Railway Operating Revenues	29,764,668	391,615,498	362,971,217
EXPENSES			
Way & Structures Excl. Depreciation	3,015,237	42,747,666	42,400,924
" " Depreciation	1,172,440	13,882,545	13,484,409
Equipment Excluding Depreciation	9,498,689	112,647,978	105,820,324
" Depreciation	1,150,311	13,794,978	13,724,576
Transportation	16,523,330	184,644,221	173,963,061
General & Administrative	2,020,966	32,639,368	28,916,816
Railway Operating Expenses	33,380,973	400,356,756	378,310,110
NET REVENUE FROM RAILWAY OPERATIONS	(3,616,305)	(8,741,258)	(15,338,893)
Other Income	1,789,347	8,103,410	8,900,040
Equity in Earnings (Losses) of Affiltd.Cos.	300,399	680,876	(1,194,837)
Miscellaneous Deductions from Income	325,116	1,348,339	754,610
INCOME AVAILABLE FOR FIXED CHARGES	(1,851,473)	(1,305,331)	(8,388,300)
Fixed Charges	1,365,145	15,872,671	16,011,807
Contingent Interest	-	-	-
NET INCOME (LOSS) (SEE NOTE)	$(3,216,618)	$(17,178,002)	$(24,400,107)

Certified Correct:

Victor C Bohne
Comptroller

* Restated to conform to 1978 accounting requirements.

NOTES: 1. In November 1976 the Financial Accounting Standards Board issued its Statement No. 13 "Accounting for Leases" requiring leases meeting certain criteria to be capitalized. Retroactive accounting was optional for leases implemented prior to January 1, 1978. This rule was adopted by the Interstate Commerce Commission in their Order No. 36604 dated October 12, 1977. Subsequently, the Securities and Exchange Commission in their Accounting Series Release No. 225 made retroactive adjustment mandatory in statements for companies with fiscal years ending after December 24, 1978. Accordingly, the table below reflects the required adjustment included in the above figures.

LOSS BEFORE RETROACTIVE ADOPTION OF F.A.S. 13.	$(2,946,368)	$(13,935,002)	$(20,093,107)
Increase in depreciation	(727,833)	(8,734,000)	(8,563,000)
Increase in interest	(1,014,667)	(12,176,000)	(12,691,000)
Decrease in rents	1,472,250	17,667,000	16,947,000
Net effect on loss	(270,250)	(3,243,000)	(4,307,000)
Loss for the period (after adjustments) as above	$(3,216,618)	$(17,178,002)	$(24,400,107)

2. The Company's results of operations are included in Retained Income without adjustment which ultimately may result from Company's entry into reorganization under the Bankruptcy Act on March 17, 1975.

3. Revaluation of assets as a result of possible permanent impairment and other adjustments which may be required as a result of examination and audit of the accounts are not reflected in this statement.

February 14, 1979

WILLIAM M. GIBBONS, TRUSTEE OF
CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY, DEBTOR
UNAUDITED
Preliminary General Balance Sheet as of December 31, 1979

ASSETS

CURRENT ASSETS			
701 - Cash			$ (2,384,230)
702 - Temporary cash investments			14,120,000
703 - Special deposits			299,533
705 - Accounts Receivable: interline and other balances			-
706 - Accounts Receivable: customers			-
707 - Accounts Receivable: other			7,722,847
708 - Interest and dividends receivable			10,660
708.5 - Receivables from affiliated companies			620,664
709 - Accrued accounts receivable			80,208,879
709.5 - Allowance for uncollectible accounts			(125,000)
710 - Working fund advances			129,346
711 - Prepayments	$ 111,026		
Capitalized Equip leases	-		111,026
712 - Material and supplies			-
713 - Other current assets			-
Total Current Assets			$ 100,713,725
SPECIAL FUNDS			
715 - Sinking Funds			$ -
716 - Capital Funds			10,849,481
717 - Insurance and other funds			-
Total Special Funds			$ 10,849,481
INVESTMENTS			
721 - Investments and advances: Affiliated companies			$ 15,993,350
721.5 - Adj: other investments and advances Affiliated Co's			(968,215)
722 - Other investments and advances			1,154
Total Investments and Advances			$ 15,026,289
PROPERTIES			
731 - Road and equipment property	$ 721,271,141		$
Capitalized equipment leases	121,227,000		842,498,141
732 - Improvements on leased property			3,682,413
Total Transportation Property			$ 846,180,554
733 - Accumulated depreciation - improvmt on leased pcpty			$ (2,436,767)
735 - Accumulated depreciation:			
Road and equipment	$(371,332,304)		
Capitalized equipment leases	(51,273,000)		$(422,605,304)
736 - Amortization of defense projects - road and equipment			(1,855,06a)
Total Transportation Property Less Recorded Depreciation and Amortization			$ 419,283,417
737 - Property used in other than carrier operations			4,479,249
738 - Accumltd depctn: prpty used in other than carrier oprns.			(1,187,620)
Prpty used in other than carrier oprns less Recorded Depreciation			$ 3,291,629
Total Properties Less Recorded Depreciation and Amortization			$ 422,575,046
OTHER ASSETS AND DEFERRED CHARGES			
739 - Organization Expenses			$ -
741 - Other assets	$ 6,953,092		
Capitalized equipment leases	1,388,000		8,341,092
743 - Other deferred charges			7,504,000
Total Other Assets and Deferred Charges			$ 15,845,092
Total Assets			$ 565,009,633

( ) Denotes credit

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WILLIAM H. [illegible], TRUSTEE OF
CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY, DEBTOR
DEBTOR IN POSSESSION

Preliminary General Balance Sheet as of December 31, 1979

LIABILITIES

CURRENT LIABILITIES		
752 - Accounts payable: interline and other balances		$ 14,155,168
753 - Audited Accounts and wages payable		1,654,062
754 - Accounts payable: other		30,064,726
755 - Interest and dividends payable	$2,092,047	
Capitalized equipment leases	1,250,000	3,342,047
756 - Dividends payable		-
757 - Payables to affiliated companies		-
759 - Accrued accounts payable		66,705,563
760 - Federal income taxes accrued		-
761.5 - Other taxes accrued		2,253,654
763 - Other current liabilities		2,214,560
Total Current Liabilities		$ 120,389,780
LONG-TERM OBLIGATIONS DUE WITHIN ONE YEAR		
764 - Equipment obligations	$ 948,904	
Capitalized equipment leases	7,132,000	
Other Obligations	3,484,000	11,564,904
LONG-TERM DEBT		
765 - Funded debt unmatured		$ -
766 - Equipment obligations		1,107,165
766.5 - Capitalized lease obligations		76,191,000
767 - Receivers' and Trustees' Securities		35,865,992
768 - Debt in default		100,462,028
769 - Accounts payable: affiliated companies		1,210,416
Total Long-Term Debt		$ 214,836,601
RESERVES		
771 - Accrued liability: pension and welfare		$ 929,245
772 - Accrued liability: leased property		100,346
774 - Accrued liability: casualty and other claims		12,730,516
Total Reserves		$ 13,760,107
OTHER LIABILITIES AND DEFERRED CREDITS		
781 - Interest in default		$ 18,864,663
782 - Other liabilities		16,730,904
782 - Other liabilities (under reorganization proceedings)		
Incurred prior to reorganization		56,935,217
Incurred subsequent to reorganization		14,342,351
784 - Other deferred credits		47,139,636
Total Other Liabilities and Deferred Credits		$ 154,012,771
SHAREHOLDERS' EQUITY		
791 - Capital stock		$ 146,058,050
798 - Retained income - unappropriated		(95,612,580)
Total Shareholders' Equity		$ 50,445,470
Total Liabilities and Shareholders' Equity		$ 565,009,633

Certified Correct:

Comptroller

Notes: 1. The Company's results of operations are included in Retained Income without adjustment which ultimately may result from Company's entry into reorganization under the Bankruptcy Act on March 17, 1975. The obligation classified above as being in default are so classified only because on March 17, 1975, the company filed a petition seeking reorganization under the Bankruptcy Act, which action is defined as an event of default in the instruments under which the obligations were issued.

2. Adjustments normally made in year-end closing of accounts, revaluation of assets as a result of possible permanent impairment and other adjustments which may be required as a result of examination and audit of the accounts are not reflected in this statement.

3. The above statement was prepared without benefit of an agreement between the Trustee of the Chicago, Rock Island and Pacific Railroad Company and the Kansas City Terminal Company, Directed Rail Carrier for use of Trustee's property and/or costs of services rendered by the Directed Rail Carrier for the Trustee. Such items were included [illegible]

WILLIAM M. GIBBONS, TRUSTEE OF
CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, DEBTOR
PRELIMINARY INCOME STATEMENT
UNAUDITED

	DECEMBER, 1979	DECEMBER, 1978
REVENUES		
Freight	$ 3,320,721	$ 27,326,020
Passenger	(340)	430,900
Other	595,477	2,007,748
Railway Operating Revenues	4,115,858	29,764,668
EXPENSES		
Way & Structures Excl. Depreciation	96,153	3,015,237
" " " Depreciation	1,190,395	1,172,440
Equipment Excl. Depreciation	468,699	9,498,689
" Depreciation	1,259,997	1,150,311
Transportation	1,212,719	16,523,330
General & Administrative	782,023	2,020,966
Railway Operating Expenses	5,010,186	33,380,973
NET REVENUE FROM RAILWAY OPERATIONS	(894,328)	(3,616,305)
Other Income	919,157	1,789,347
Equity in Earnings (Losses) of Affiltd. Co	(82,158)	300,599
Miscellaneous Deductions from Income	684,005	325,114
INCOME AVAILABLE FOR FIXED CHARGES	(741,334)	(1,851,473)
Fixed Charges	1,483,129	1,365,145
Contingent Interest	-	-
NET INCOME (LOSS)	$ (2,224,463)	$ (3,216,618)

Certified Correct:

Comptroller

Notes: 1. The Company's results of operations are included in Retained Income without adjustment which ultimately may result from Company's entry into reorganization under the Bankruptcy Act on March 17, 1975.

2. Adjustments normally made in year-end closing of accounts, revaluation of assets as a result of possible permanent impairment and other adjustments which may be required as a result of examination and audit of the accounts are not reflected in this statement.

3. In conformity with I.C.C. Order #34604 dated October 12, 1977, certain leased equipment acquired has been capitalized. The effect of this requirement results in adjustments increasing net loss for December, 1979 by $389,000 and increasing net loss for December, 1978 by $270,000.

4. Equipment expenses include progressed repairs made with funds borrowed under contract with the FRA and repairs made under shipper sponsorship loans. FRA repairs made after October 4, 1979 have been paid by the Kansas City Terminal Co. (D.R.C.) and accrued by the Trustee as an expense. FRA repairs in December, 1979 were $628,000 and $503,000 in the same month of 1978. No shipper sponsorship repairs were made in December, 1979 and $563,000 in December, 1978.

5. The above statement was prepared without benefit of an agreement between the Trustee of the Chicago, Rock Island and Pacific Railroad Company and the Kansas City Terminal Company, Directed Rail Carrier for use of Trustee's property and/or costs of services rendered by the Directed Rail Carrier for the Trustee. Such items were included on an estimated basis and may be subsequently adjusted.

March 11, 1980
/bjt-4

APPENDIX H

RESPONSE OF INTERVENORS CROWN, ET AL. TO TRUSTEE'S REPORT

September 6, 1979

IN THE UNITED STATE DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In the Matter of	)	
	)	In Proceedings for the
CHICAGO, ROCK ISLAND AND	)	Reorganization of a
PACIFIC RAILROAD COMPANY,	)	Railroad
	)	
Debtor.	)	No. 75 B 2697

RESPONSE OF INTERVENORS CROWN ET AL. TO TRUSTEE'S REPORT FOR 1978 AND FOUR MONTHS 1979

ALBERT E. JENNER, JR.
DANIEL R. MURRAY
CARTER H. KLEIN
LINDA H. MULLENBACH
JENNER & BLOCK
One IBM Plaza
Room 4400
Chicago, Illinois 60611
312/222-9350

September 6, 1979

Island for the entire year in 1978, and is over double the number of carloads carried in the first half of 1979.

In summary, then, there has been no long-term improvement in the Rock Island's traffic either in 1978 or in the first half of 1979. On the contrary, since Mr. Manos uttered his confident prediction to the Court that the Rock Island had "turned the corner," the Rock Island traffic has stagnated, and in the first half of 1979 has deteriorated.

These conclusions are confirmed from three different perspectives:

(1) in terms of the Rock Island's own past performance,

(2) in terms of the performance of other Western District Railroads, and

(3) as measured against the Trustee's own forecasts.

In short, the Rock Island's depressed carloading level remains stagnant or has deteriorated, while the traffic of its competitors has been increasing.

B. EARNINGS

The second criterion on which we must judge the Rock Island's performance is its earnings. Last September, Mr. Manos represented to the Court that:

> "we are close, now -- close as we have been in the three and a half years of this reorganization -- to the formulation and filing of a plan. I state that with confidence."

(Tr. Sept. 18, 1978, at p.5.)

The basis for Mr. Manos' confidence was the upturn in carloadings and profitability he discerned in the summer and fall of 1978. In order to test that confidence, we must look to the earnings record of the Rock Island in 1978 and subsequently in 1979. Specifically, we must view that record from three different perspectives:

(1) in the light of the Rock Island's prior history of earnings,

(2) in light of the earnings of other railroads, and

(3) in light of the Trustee's own forecasts.

From all three perspectives, the magnitude of the Rock Island's losses in 1978 and the first half of 1979 is staggering. Those losses prove conclusively that the Rock Island is not reorganizable on an income basis.

(1) <u>The Rock Island's earnings history</u>.

Last September, Mr. Manos made the following representations to the Court:

> "What I am saying, your Honor, is that our act was in place -- if it wasn't for that hard winter [1977-1978], I don't believe that we would even have, at this moment, the accumulated deficit

> through July of eleven or twelve million -- I think it's less -- it's eleven million now, it's going down. However, since then, the Rock Island has dramatically reversed the trend. In May, it had a profit, on a fully accrued basis of $234,000 -- that's a black bottom line.
>
> "How did we do it? We had carloads of 66,887 cars versus 65,540 in 1977, when we lost a small amount -- $225,000.
>
> "In June, the Rock Island had a profit of $1,070,000, on a fully accrued basis; and it did it with 68,086 cars, an increase over 1977, when we had 65,295 cars.
>
> "In July, we had a small loss of less than a half a million dollars; but there we had the loss because our carloadings went down a little bit to 60,025 cars as against 62,407 in 1977. But it proved a point that when we go below a certain figure on monthly carloads, we have a small loss. But I say to your Honor that we are going to have consistant months, now, in profitability of over 65,000 carloads per month. That is going to be the pattern, in my opinion -- I'm cautiously optimistic about that from here on in."

(Tr. Sept. 18, 1978, at pp. 16-17) (Emphasis added).

Mr. Manos repeated and strengthened that pledge later in his report:

> "No way is the Rock Island going to lose twenty or $22,000,000 annually from here on in -- it's not going to happen. It happened in the first six months, but it's not going to happen in the last half of 1978, your Honor, I assure you."

(Tr. Sept. 18, 1978, at p. 101) (Emphasis added).

Unfortunately, Mr. Manos' confidence was misplaced. Table X displays the monthly losses of the Rock Island in 1978.

TABLE X

ROCK ISLAND NET INCOME (LOSS)

1978

(in millions of dollars)

	ICC Basis	Rock Island's Depreciation Basis
January	(3.8)	(3.9)
February	(4.8)	(5.6)
March	(.6)	(1.7)
April	(1.5)	(1.6)
May	(.2)	.2
June	.4	1.1
July	(.5)	.5
August	.5	.5
September	(.5)	.8
October	.4	1.4
November	(2.7)	(2.1)
December	(3.6)	(3.2)

The Rock Island did break slightly into the black in the summer and early fall -- traditionally its best months. But the familiar pattern of losses resumed in November -- with a vengeance. As a result, in 1978 after year-end adjustments, the Rock Island lost $21.2 million on an ICC accounting basis and $17.9 million on the Trustee's own depreciation accounting basis. These figures would have been much larger had the Trustee paid his employees the national wage scale and properly maintained his physical plant.

Current losses of the Rock Island are the largest it has ever experienced in its 105 year history. This is so even though the losses represent the experience of only six months, as shown by Table XI below.

TABLE XI

ROCK ISLAND LOSSES
January-June, 1979

(in millions of dollars)

	ICC Basis	Depreciation Basis
January	(8.6)	(9.1)
February	(10.5)	(11.4)
March	(9.6)	(10.2)
April	(5.9)	(6.0)
May	(5.7)	(6.0)
June	(4.6)	(4.0)
Total	(45.1)	(46.7)

Although the Trustee blames the severe winter for his losses, that reason fails to explain why losses are so great in the months of March, April, May and June, months which customarily benefit from revenue traffic that could not be hauled earlier because of the winter. Where are the benefits of the new locomotive power? Where are the benefits of the thousands of new and rehabilitated cars that the Trustee has prevailed upon the Court to obtain? Where are the benefits of the Trustee's much touted rehabilitation and marketing efforts? Translated into earnings, they are nowhere to be seen.

The Trustee's insistence upon a traditional income based reorganization of the Rock Island is frightening because of the Rock Island's consistent pattern of losses since 1965--a period approaching 15 years. The magnitude of those losses now exceeds a staggering quarter of a billion dollars. Over sixty percent of that sum, $157.3 million, has been incurred in the post-reorganization years from 1975 through June, 1979.

Yearly losses, particularly since 1974, have accelerated, as shown by Table XII below:

TABLE XII

ROCK ISLAND NET LOSSES
1965-1979
ICC Accounting

(in millions of dollars)

Year	Net Loss
1965	(1.5)
1966	(3.6)
1967	(16.7)
1968	(4.8)
1969	(9.8)
1970	(16.6)
1971	(6.4)
1972	(5.9)
1973	(15.0)
1974	(23.1)
1975	(31.2)
1976	(25.0)
1977	(34.8)
1978	(21.2)
1979*	(45.1)
Total	($260.7)

* Six months only.

Another informative, historical comparison of earnings that demonstrates the accelerated losses of the Rock Island comes from page four of the Trustee's Report for the Rock Island for 1976. Compared in that Report are the Rock Island's earnings for the five-year period 1972-1976 on the Trustee's own depreciation accounting basis. The Trustee's comparisons show, amazingly, that instead of a loss, in 1972, the Rock Island operated at a profit, and that losses in pre-reorganization years were less than they would be on an ICC accounting basis, as demonstrated in Table XIII below. (This calls into serious question the Trustee's statements that under prior management the Rock Island was undermaintained in pre-reorganization periods, or, more likely, shows that the depreciation method of accounting is an unreliable indicator of proper maintenance levels.)

TABLE XIII

ROCK ISLAND NET INCOME (LOSS)

1972-1979

(in millions of dollars)

Year	Depreciation	ICC
1972	1.5	(5.9)
1973	(13.5)	(15.0)
1974	(17.5)	(23.1)
1975	(25.0)	(31.2)

1976	(14.0)	(25.0)
1977	(24.4)	(34.8)
1978	(17.2)	(21.2)
1979*	(46.7)	(45.6)

*Six months only.

The Trustee's Report describes 1978 as a "pivotal" year for the Rock Island -- another way of saying that in 1978 the Rock Island "turned the corner." Trustee's Report, p. 5. One might ask pivotal to what? The Trustee presumably finds solace in the fact that the Trustee had smaller losses in 1978 than in 1977. But the same could have been said about 1976, because it too was preceded by a year with larger losses. 1976, however, was followed by a year with greater losses - a cycle the Rock Island will obviously duplicate in 1979. In any event, it is inconceivable how the Trustee can take solace in losses ranging from $17 to $21 million (depending on the method of accounting).

Nevertheless, a comparison of the Trustee's "pivotal" year 1978 with 1976 might be instructive to ascertain if any real progress has been made in these proceedings in that two-year period. The Rock Island fared about the same income-wise in 1978 as it did in 1976, as Table XIV below shows. The table also reveals, however, that from an operations standpoint, the Rock Island fared much worse in 1978 than it did in 1976.

TABLE XIV

ROCK ISLAND INCOME PERFORMANCE

1978 VS. 1976

(depreciation basis)

(in thousands of dollars)

	1978	1976
Revenues	391,615	341,320
Expenses	409,290	355,412
Net Railway Operating Income	(17,675)	(14,092)
Income Available for Fixed Charges	(10,239)	(11,357)
Net Income (Loss) (without capitalization of leases)	(13,935)	(13,857)

Table XIV shows that 1978 was, if anything, a significantly worse year than 1976, as far as income generated from operations is concerned. In 1976 the Rock Island suffered net railway operating losses of $14.1 million compared with $17.7 million for 1978, or $3.6 million worse in 1978. Thus, operating losses were 25% greater in 1978 than they were in 1976, using the Trustee's own depreciation method of accounting. It was only because the Trustee received $7.4 million in nonoperating income and other nonoperating credits compared with $2.7 million in 1976, that the Trustee was able to generate negative

income for fixed charges and net losses in 1978 no worse than that of 1976.

(2) Comparison with other railroads.

At the status report last September, Mr. Manos asserted that the Rock Island's heavy losses in the winter months were no different from the losses experienced by other railroads:

> "Your Honor, I repeat that the first four months were a loss -- we lost 12.8 million through April -- there was a reason for that. There was a very heavy winter [1977-78], as you recall, your Honor. This is not something that the Rock Island experienced alone; this is something that all of the railroads experienced."

(Tr. Sept. 18, 1978, at pp. 15-16.)

An examination of the reports rendered by other railroads reveals Mr. Manos' argument to be incorrect, with respect not only to 1978 but also to the first half of 1979.

Compared with its competitors, many of which experienced the same winter, Rock Island's earnings performance leaves it next to the bottom of the list for the first half of 1979.

Table XV shows the earnings of the Western District railroads, as well as the Illinois Central, the Norfolk & Western and the Elgin Joliet & Eastern (railroads which compete in the Western District but are not classified as Western District railroads).

TABLE XV

EARNINGS
First Half 1979
(in millions of dollars)

BN	109.0
N&W	100.8
UP	81.1
ATSF	61.3
SP	60.0
MP	53.3
SSW	25.6
DRGW	13.9
EJ&E	11.8
C&S	10.1
KCS	9.0
SLSF	8.0
Soo	7.8
FWD	7.2
DMIR	3.2
MKT	(0.4)
ICG	(8.4)
CNW	(38.1)
RI	(45.0)
CMSt.P	(59.1)

Source: ICC RE&I

The Rock Island's performance ranks ahead only of the seriously troubled bankrupt Milwaukee.

Reading the Trustee's Report, one is left (surface wise) with the impression that 1978 was a banner year for the Rock Island.

But how does it compare with its competitors in earnings? It was second to last, ahead only of the Milwaukee, as Table XVI shows:

TABLE XVI

NET INCOME (LOSS) 1978

(in millions of dollars)

N&W	165.2
UP	141.8
BN	113.6
MP	101.9
ATSF	92.5
SP	55.9
SSW	32.9
DRGW	24.5
Soo	23.3
SLSF	20.6
EJ&E	15.0
KCS	14.4
DMIR	6.3
FWD	5.8
WP*	5.5
C&S	3.4
MKT	2.4
ICG	(2.0)
CNW	(15.9)
RI	(21.2)
CMSt.P	(65.2)

Source: ICC RE&I

* Excludes extraordinary item of $115,561,000.

In short, the Trustee can find no solace in a comparison of his net losses with the performance of other railroads.

(3) Comparison with Trustee's forecasts.

The Trustee's Report attempts to impeach the FRA study of the Rock Island because it predicted $29.5 million in Rock Island losses in 1978 and actual losses were only $18 million. Trustee's Report, p.5.

What the Trustee overlooks is that had he paid the national wage scale retroactive to January 1, 1978, as did all other railroads, the Trustee would have incurred $6-8 million in additional operating expenses because of increased labor costs. In addition, the FRA study assumed normalized maintenance expenditures for the Rock Island. The Rock Island, however, was dramatically undermaintained in 1978.[1] Allowing for these variables the FRA study was quite accurate. As for 1979, net losses predicted by the FRA will understate actual Rock Island losses by many millions of dollars.

If stones are to be cast at forecasters, the Trustee's own glass house is extremely vulnerable. We need only recall the following statements of the President of the Rock Island, Mr. Ingram, solemnly presented under oath to the Court and creditors to justify the borrowing of millions of dollars at the expense of creditors:

> "Good marketing will add $150 million to the net income of the railroad over a three-year development period. The annual rate of improvement at the end of the third year should be between $60 and $70 million." (Emphasis added.) Direct Testimony of Trustee's Witness John W. Ingram, p. 2 of Direct Testimony of Trustee's Petition for Authority to Issue Trustee's Certificates (Oct. 15, 1975) (hereinafter "ERSA Testimony").
>
> "John D. Mitros has been hired to eliminate

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[1] See pages 41 - 49, infra.

> surplus personnel and tighten management practices. Good progress has been made in this area. It will add an estimated $50 million annually to the net income of the railroad after a three-year program of improvement." Id. at 2.
>
> "As we make further progress we will, in a reasonably short period of time, be fully viable even at current economic levels." Id. at 4.
>
> "Revenues will increase more quickly than expenses and the ability of Rock Island to internally generate capital will be substantially greater than it has been since the 1950's." Id. at 4.

In 1976-77, the Trustee and his staff submitted forecasts to the FRA and the creditors in support of a proposed capital budget of $160 million. Those forecasts proved so unreliable that even the Trustee's own personnel found them incredible and they were withdrawn within months after they were submitted.

The Trustee's most recent forecast of earnings, submitted at the end of 1977 to the FRA and creditors, Base Case I, is likewise already obsolete.

An analysis of Base Case I underscores the unreliability and excessive optimism of the Trustee's forecasts. This forecast is the third and latest generated by the Trustee; each successive forecast revised downward traffic and hence revenues. Table XVII compares the Trustee's forecast in Base Case I with actual results.

TABLE XVII

ACTUAL vs. FORECASTED INCOME STATEMENT 1978

(in thousands of dollars)

	Forecasted	Actual	Difference	Favorable (Unfav.) Percentage
Total Revenues	416,685	391,616	(25,069)	(6.0)
Operating Expenses	318,367	315,183	3,184	1.0
Net Revenue	98,318	76,433	(21,885)	(22.2)
Tax Accruals	5,294	4,726	568	10.7
Rents	64,321	66,209	(1,888)	(2.9)
Net Railway Operating Income	28,703	5,498	(23,205)	(80.8)
Engineering and Mechanical Programs	32,532	34,493	(1,961)	(6.5)
Net Income (Loss)	306	(21,162)	(21,468)	(infinite)

Table XVII reveals that while revenues fell short of prediction by $25.1 million or 6%, operating expenses were only $3.2 million or one percent less than predicted. This largely contributed to a net railway operating income[2]

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[2] The Trustee's management income statement excludes from operating expense "programs" for mechanical and engineering expenses which normally would be included as operating expenses.

shortfall of $23.2 million or 80.8% and a net income shortfall of $21.5 million. The slight profit projected became a huge loss. Moreover, these significant shortfalls in actual earnings occurred in the twelve months immediately following the month in which the forecasts were presented, further impeaching the credibility of the Trustee's entire forecasting process.

In summary, then, we find that Mr. Manos' predictions of an upturn in the earning power of the Rock Island, as with his predictions concerning carloadings, have proven completely mistaken. Since the fall of 1978, the Rock Island's record of net losses is an unmitigated catastrophe.

Since September, 1978, when Mr. Manos made his prediction that the Rock Island had "turned the corner," the Trustee has reported net losses totalling $51.5 million on an ICC basis and $49.8 million on the Trustee's own depreciation accounting basis. The breakeven months of the summer and early fall of 1978 have proven to be not only a "flash in the pan" but the "calm before the storm."

The Trustee thus has failed to rebut the presumption established by the creditors at the September 18, 1978 status report that the Rock Island is not reorganizable on a traditional income or other basis.

The Trustee's poor track maintenance performance has resulted in more frequent accidents and higher loss and damage claims. An FRA study of accident frequency, released in late 1978 for the year 1977, revealed the Rock Island was the most accident prone railroad in the nation.

Comparing the Rock Island's loss and damage ratio with those of its competitors also is an indication of the Rock Island's poor track condition. Based on first quarter 1979 loss and damage reports to the Interstate Commerce Commission, the Rock Island had the fourth highest loss and damage ratio of the twenty-one railroads competing in the Midwest.

The Trustee's inadequate maintenance spells additional trouble over the long term. Each year that normalized maintenance levels are not achieved, the railroad sinks into a more advanced state of deterioration, creating a further drain on already inadequate resources.

D. NET WORKING CAPITAL

One of the indicators of the state of health of a business is its net working capital position. Net working capital is the difference between short term assets and short term liabilities and other liabilities coming due within the year. It is a reliable indicator which shows whether the business is able to operate without

resort to hand to mouth practices, juggling payables, and straining to meet current expenses by running down current assets and building up current liabilities.

During the course of the Trustee's administration, the working capital position of the railroad has deteriorated steadily, significantly and alarmingly. Table XXIII traces the changes in the Rock Island's working capital position from December 31, 1973 through June 30, 1979.

TABLE XXIII

NET WORKING CAPITAL 1973-1979
(in millions of dollars)

	Net Working Capital (Deficit)
December 31, 1973	(25.8)
December 31, 1974	(26.0)
March 16, 1975	20.2
December 31, 1975	16.6
December 31, 1976	7.8
December 31, 1977	(9.7)
December 31, 1978	(26.2)
January 31, 1979	(33.1)
February 28, 1979	(41.4)
March 31, 1979	(48.0)
April 30, 1979	(50.4)
May 31, 1979	(52.4)
June 30, 1979	(52.2)

From 1973 to 1974, the railroad's working capital deteriorated in the amount of $250,000. Because of the reclassification of current liabilities to deferred liabilities as a result of the filing of the reorganization petition, the working capital position of the railroad improved by $46.2 million between December 31, 1974 and

March 17, 1975. The Trustee was thus able to start his trusteeship with a substantial positive net working capital position of $20.2 million. Unfortunately, from March 17, 1975 to December 31, 1975, net working capital decreased by $3.7 million at a rate of 14.6 times that of 1974. During 1976 working capital deteriorated by $8.8 million or at a rate of 35 times the rate of deterioration of 1974. After December 31, 1976, net working capital dropped by $17.5 million, turning a positive $7.8 million to a deficit of $9.7 million. In 1978, the net working capital deficit increased by $16.5 million to $26.2 million, although part of the additional deficit resulted from capitalization of financing leases in accordance with newly adopted accounting procedures.

Despite the influx of millions in Federal funding, the Rock Island net working capital deficit doubled in the first six months of 1979. The deficit increased from an already huge $26.2 million to an incredible $52.2 million. It is little wonder that the Trustee's cash reserves are all but depleted in mid-summer, traditionally the Rock Island's most prosperous season of the year.

The Rock Island net working capital deficit even exceeds that of the bankrupt Milwaukee Road. At the end of the first quarter of 1979, the Milwaukee's net working capital deficit stood at $32.1 million compared to the Rock Island's deficit of $48.3 million, a difference of

$16.2 million. Similarly, the Rock Island's increase in its net working capital deficit rivaled that of the Milwaukee for the 12-month period ending March 31, 1979. The Rock Island's deficit increased by $33.8 million, the Milwaukee's by $33.4 million, while the net working capital of 17 Western District railroads (including the Rock Island and the Milwaukee), and the N & W, EJE and ICG decreased on the average by only $4.25 million.

E. DETERIORATION IN CASH RESERVES

Rivaling its deterioration in net working capital is the Rock Island's deterioration in its cash reserves. For the first time in these proceedings, the Trustee's ability to meet his payroll became sufficiently in doubt that he sought authority to invade the escrow funds in late March of this year. Just when creditors were beginning to feel relieved because the authority was not exercised, the Trustee made a second request on June 27, 1979 for authority to invade the escrow funds to meet the end of the month payroll. This request was not made during a severe winter or spring flooding. It came in late June when traffic flows should have been normalized and cash flows restored.

This second cash request, more than any other factor, demonstrates how close the Trustee, the creditors and shareholders, not to mention the public interest, are to the precipice. Indeed, the Rock Island is alive

and gasping today not because of any ability to generate capital on its own, but by reason of RTA, shipper, State, ERSA, §505 and §511 4-R Act funding, the deferral of fixed and prepetition charges under §77 of the Bankruptcy Act, and the payment of substandard union wage scales.

Creditors were amazed to learn in discussions with the Trustee's staff on the car leasing program on April 9, 1979 that the Rock Island, presumably for reasons of cash conservation, was not spending any of its internally generated funds in 1978 to repair rolling stock either before or after it received funding under the $33 million FRA §511 car repair program. Instead, the Rock Island was relying solely on shipper sponsorship funds. Little wonder that the Rock Island has maintained a huge inventory of bad order cars during the last several years.

Similarly, the creditors also discovered that the Trustee's increasingly poor cash and net working capital position has severely further constrained the Trustee's minimal track maintenance projects, as noted above. In 1978, much of the limited rehabilitation work the Rock Island undertook was funded by the RTA, the State of Iowa and Iowa shippers. For example, of the 43.21 miles of new rail laid, 16.74 miles of it, or more than 38%, was RTA funded. Much of the remaining rail laid represented repair of northwest Iowa branch lines funded by interest-free loans from shippers and the State of Iowa.

We also note with extreme concern the Trustee's claim that he may be unable to fund for lack of cash the single most important planning project of his Trusteeship, i.e., the retention of an independent consultant to conduct a thorough study of the Rock Island's reorganization propsects and viability. Statements by Trustee's counsel in this regard are astounding because all that is involved is the rendition of 4,600 man hours of service by existing personnel and possibly the hiring of one or two additional employees. The total cost to the Rock Island should approximate only $100,000.00 (4600 man hours of Rock Island personnel x $20.00/hour).

Table XXIV below shows the Trustee's deteriorating cash position:

TABLE XXIV

ROCK ISLAND CASH AND SHORT TERM INVESTMENTS
(in millions of dollars)

Date	Amount
December 31, 1974	$ 3.6
March 17, 1975	6.8
December 31, 1975	20.8
December 31, 1976	19.6
December 31, 1977	16.4
December 31, 1978	16.6
January 31, 1979	12.0
February 28, 1979	4.6
March 31, 1979	4.6
April 30, 1979	3.2
May 31, 1979	3.9
June 30, 1979	3.0

Source: ICC CBS Reports and RI General Balance Sheets.

Table XXIV is deeply disturbing because the depletion of the Trustee's cash reserves has occurred in what is traditionally the Rock Island's most prosperous season of the year. As a result, the Trustee will enter the winter months of 1979 with no reserve of cash and the most unfavorable working capital deficit in its entire history.

If the Rock Island is afflicted by either (i) another severe winter, (ii) an economic recession of any significance at all or (iii) a crippling strike,[3] it will clearly not survive another year absent massive federal financial assistance supplied, if at all, at the expense of the creditors and the erosion of their security.

III. THE NATURE OF SECTION 77

The symptoms of the critical illness that afflicts the Rock Island are painfully obvious, as we have just seen: depressed carloadings, massive losses and erosion of the Debtor's estate, inadequate maintenance,

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[3] Unfortunately, a strike is now in progress.

APPENDIX I

INTERSTATE COMMERCE COMMISSION ABANDONMENT DECISION

May 23, 1980

EC

INTERSTATE COMMERCE COMMISSION

Report

Docket No.AB-46(Sub-No.22)

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, DEBTOR
(WILLIAM M. GIBBONS, TRUSTEE)-ABANDONMENT-ENTIRE SYSTEM

Decided: May 23, 1980

Recommendation made to the Reorganization Court that the Trustee of the Chicago, Rock Island and Pacific Railroad Company be permitted to abandon all lines and discontinue all operations. We further recommend that the Court withold abandonment and discontinuance authority for the lines involved in Finance Docket No. 28799 (Sub-No. 1), St. Louis Southwestern Railway Company-Purchase (Portion)-William M. Gibbons, Trustee of the Property of Chicago, Rock Island and Pacific Railroad Company, Debtor Between Santa Rosa, NM and St. Louis, MO, until the Commission issues a final decision. We also recommend that the Reorganization Court require the Trustee, at a reasonable price to offer the lines in appendix D for acquisition for continued rail service. Other conditions are also recommended.

Martin L. Cassell, Nicholas G. Manos, and Don McDevitt for applicant Chicago, Rock Island and Pacific Railroad Company, Debtor (William M. Gibbons, Trustee).

James E. Armstrong and Dellon E. Coker for the United States Depart of Defense.

Mark G. Aron, Diane R. Liff, Cleveland Thornton, and Ray Velarde for the United States Department of Transportation.

T. Scott Bannister for the Iowa Department of Transportation, Transportation Regulation Board.

Tom L. Green and Robert T. Stephan for the State of Kansas.

Richard P. Braun for the Minnesota Department of Transportation.

Floyd W. Taylor for the Oklahoma Department of Transportation.

Owen T. Kinney for the Railroad Commission of Texas.

Frederick J. Griffin for the Panhandle Regional Planning Commission.

Marvin V. Butler for the City of Manhattan, KS.

Harlin Owens and Larry Haugen for the City of Worthington, MN and Worthington Industries, Inc.

Harold C. Kaplan, Terry F. Moritz, and Daniel R. Murray for certain creditors.

James J. Irlandi for SRI Inc.

Carl M. Gaass for the Altoona-Pella Shippers Association.

John D. Heffner for the Keokuk Northern Real Estate Company.

Wayne Bevis for Rolscreen Company.

G. D. Kelly for Sun Oil Company of Pennsylvania.

Thomas P. McFarland, Jr. for Williamette Industries, Inc.

Stuart Gassner for the Chicago and North Western Transportation Company.

Michael E. Roper and W. A. Thie for the Missouri-Kansas-Texas Railroad Company.

John S. Shannon, Donald M. Tolmie, and William C. Wooldridge for the Norfolk and Western Railway Company.

John O'B. Clarke, Jr. for the Railway Labor Executives' Association.

REPORT

The Chicago, Rock Island and Pacific Railroad Company, Debtor (William M. Gibbons, Trustee) (Rock Island) filed an application[1/] on April 24, 1980 to abandon all lines and discontinue all operations over its entire 10,468 mile system. Rock Island is a common carrier by railroad subject

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1/ No fee accompanied this application. Normally we require a $700 fee with an abandonment application. See 49 CFR §1002.2(d)(17). Because of the financial condition of the Rock Island, as documented in this report, we will waive payment of the fee.

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to subchapter I of chapter 105 of title 49, United States Code.

An expedited proceeding has been conducted under the ICC's regulations entitled Abandonment of Railroad Lines and Discontinuance of Service, 49 CFR Part 1121 (1979) Subpart F, Abandonment Procedures for Bankrupt Railroads, 44 Fed. Reg. 73105 (December 17, 1979) (Abandonment Procedures). Under these procedures, as modified, comments on the proposed abandonment were required to be filed in the form of sworn statements by May 5, 1980. We have also accepted, and considered any late filed comments.

Section 17(a) of the Milwaukee Railroad restructuring Act, Pub. L. No. 96-101, 93 Stat. 736 (1979) (MRRA), has transferred ultimate jurisdiction over Rock Island abandonments from the Commission to the United States District Court for the Northern District of Illinois, Eastern Division (Bankruptcy Court), the Honorable Frank J. McGarr presiding -- the same Court that has jurisdicton over the Rock Island reorganization/liquidation, pursuant to section 1170 of the Bankrupty Code, 11 U.S.C. §1170. The Bankruptcy Court entered Order No. 232 (contained in Appendix H) on April 14, 1980 directing the Commission to present its report in this proceeding no later than 30 days after the Rock Island filed its abandonment and discontinuance application, which is May 24, 1980. The instant report contains our recommendations on the abandonment and discontinuance request.

CONCLUSIONS

We conclude that abandonment of the Rock Island and its dissolution as an operating railroad is required by the public convenience and necessity. We have reviewed the carriers present financial position and future prospects and

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conclude that it has no realistic hope for reorganization or continued public service in its present form. The extremely deteriorated condition of its plant and severe erosion of its traffic base (through interrupted and uncertain operations) make it clear that the Rock Island will not be able to recover. Consequently, fairness to its creditors and stockholders dictates that the carrier be liquidated. Nevertheless, the communities and shippers served by the Rock Island have also shown that many of its services are essential and can be profitable. We recommend to the Court that, in permitting abandonment, it take steps to insure that the service over the viable portions of the Rock Island is not interrupted and that these portions are sold as operating lines. This will not only avoid interruption in service, but insure that the affected roadbeds and facilities are not allowed to deteriorate further through disuse or neglect. In many cases applications for the purchase of these segments or negotiations aimed at purchase are already underway, and the lines are being operated by other carriers. We would also include any other segments that attract bona fide offers. We think this resolution--total abandonment with minimum service interruption--is fair to all concerns.

PARTIES

Comments on the Rock Island abandonment application were filed by the Department of Defense (DOD), Department of Transportation (DOT), Iowa Department of Transportation, Transportation Regulation Board (IA-DOT), State of Kansas (Kansas), Minnesota Department of Transportation (MN-DOT), Oklahoma Department of Transportation (OK-DOT), Railroad Commission of Texas (RR-TX), Panhandle Regional Planning

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Commission (Panhandle), City of Manhattan, KS (Manhattan), City of Worthington and Worthington Industries, Inc. (Worthington), Continental Illinois National Bank and Trust Company (Continental), The First National Bank of Chicago (First National), Henry Crown, et al. (Crown), SRI Inc. (SRI), Altoona-Pella Shippers Association (APSA), Keokuk Northern Real Estate Company (Keokuk), Rolscreen Company (Rolscreen), Sun Oil Company of Pennsylvania (Sun Oil), Williamette Industries, Inc. (Williamette), Chicago and Northwestern Transportation Company (C&NW), Missouri-Kansas-Texas Railroad Company (Katy), Norfolk and Western Railway Company (N&W), and Railway Labor Executives' Association (RLEA).

MOTION TO REJECT

The Railway Labor Executives' Association (RLEA) joined by Williamette Industries, Inc., filed a motion to reject Rock Island's application on May 5, 1980, alleging that: (1) the application does not comply with the Abandonment Procedures; and as a result of this (2) there is insufficient information for the Commission to evaluate the application.

Technically RLEA is correct that Rock Island's application does not comply completely with the Abandonment Procedures. However, in light of the Court's order requiring Rock Island to file an application on 10 days notice, and considering Rock Island's poor financial condition, we will not require technical compliance with our Abandonment Procedures in this instance. While the application itself may not contain sufficientinformation we have obtained information needed to prepare a reasoned report by taking official notice of numerous publicly available documents

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dealing with the Rock Island. We do not believe that RLEA has shown the likelihood of any real prejudice arising from the use of the Commission's publicly available information on the financial and operational state of the Rock Island. We will therefore deny RLEA's motion to reject because of this proceeding's unique circumstances.

HISTORY OF THE ROCK ISLAND

The Rock Island and its predecessor companies have basically existed as granger railroads since 1847; however, the purposes of this report are best served by focusing on Rock Island's recent history.

On March 17, 1975, Rock Island sought protection and began bankruptcy proceedings under Section 77 of the Federal Bankruptcy Act. We found Rock Island cashless on September 26, 1979 and ordered the Kansas City Terminal Railway Company (KCT) to provide directed service, at government expense, over the Rock Island routes. See Kansas City Term. Ry. Co.-Operate - Chicago, R.I.& P., 360 I.C.C. 289 (1979). This ended on March 23, 1980. Currently, directed service over portions of Rock Island is being carried on by a number of carriers on an uncompensated basis.[2/] However, on May 31, 1980, this too will end.

2/ See Directed Service Order No. 1437, Regional Transportation Authority - Directed Service - Chicago, Rock Island & Pacific Railroad Company, Debtor (William M. Gibbons, Trustee) over Chicago Commuter Line (not printed) decided March 20, 1980, 45 Fed. Reg. 21841; Directed Service Order No. 1453, St. Louis Southwestern Railway Company-Directed Service-Chicago, Rock Island & Pacific Railroad Company, Debtor (William M. Gibbons, Trustee) between Santa Rosa, NM and St. Louis, MO (not printed) decided March 21, 1980, 45 Fed. Reg. 21843; Directed Service Order No. 1456, St. Louis Southwestern Railway Company - Directed Service - Chicago, Rock Island & Pacific Railroad Company, Debtor (William M. Gibbons, Trustee) between Memphis, TN, and Forrest, AR (not printed) decided March 24, 1980, 45 Fed. Reg. 21839; and Directed Service Order No. 1462, Various Railroads-Directed Service - Chicago, Rock Island & Pacific Railroad Company, Debtor (William M. Gibbons, Trustee) (not printed) decided March 28, 1980, 45 Fed. Reg. 22943.

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The Rock Island filed a plan of reorganization on December 28, 1979, which was rejected by the Bankrupty Court on January 25, 1980. It was stated that continuation of the Rock Island on an income producing basis, whether in core, in whole, or in part is just not possible. Judge McCarr then entered Order No. 229 requiring the filing of a plan by Rock Island to liquidate assets by July 17, 1980.

DESCRIPTION OF THE ROCK ISLAND

Rock Island operated in the 13 states of Arkansas, Colorado, Illinois, Iowa, Kansas, Louisiana, Minnesota, Missouri, Nebraska, New Mexico, Oklahoma, Tennessee, and Texas. Its main routes are between Chicago and Tucumcari, NM, via Kansas City; St. Louis and Tucumcari via Kansas City; Memphis and Tucumcari via Little Rock, Oklahoma City, and Amarillo; Chicago and Denver via Council Bluffs and Omaha; St. Louis and Denver via Kansas City; the Twin Cities and Galveston via Des Moines, Kansas City, Fort Worth, Dallas, and Houston; and Chicago and both Minneapolis and Galveston.

The 10,468 mile system consists of 8,139 miles of main track and 2,329 miles of branch line. Included in the Rock Island system are 762.20 miles of trackage rights over numerous carriers (detailed in Appendix E). The following table indicates the Federal Railroad Administration (FRA) track class (49 CFR §213.9) of main lines as of May 1979.

TABLE 1

FRA Class	Maximum Speed (miles per hour)	Number of Miles	% of Total
IV	50	208.1	3.3
III	40	2090.7	33.3
II	25	1857.8	29.4
I	10	2169.4	34.3
Total	-	6326.0	100.0

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FRA inspected the portions of the Rock Island operated under directed service as of February 15, 1980, and found the following FRA track classes on main lines.

TABLE 2

FRA Class	Maximum Speed (Miles per hour)	Number of Miles	% of Total
III & IV	40 or 50	1829.5	33.7
II	25	1863.2	34.3
I	10	1322.8	24.3
less than I	less than 10	420.8	7.7
Total	-	5436.3	100.0

Rock Island has also requested authority to abandon its subsidiary railroad companies that are an integral part of its system. They are the Galveston Terminal Ry. Co. (equal ownership with Burlington Northern, Inc.) (Galveston Terminal); the Oklahoma City Junction Railway Company (equal ownership with the Atchison, Topeka and Santa Fe Railway Company) (Oklanoma City Jct.); the Peoria & Bureau Valley Railroad Company (96.7% ownership); the Peoria Terminal Company (100%); and Pullman Railroad Company (100%).

The Rock Island principally provides freight service,operating only one commuter passenger service line. As of July 25, 1979, it operated a total of 142 trains over the system, mostly daily trains. It had 383 road diesel locomotive units in service on July 26, 1978, and 347 on July 25, 1979. The number of freight cars owned and leased totaled 25,139.

The only passenger line operated by the Rock Island is the Chicago-Joliet, IL commuter line. Approximately 40,000 daily riders rely on the commuter service. It is estimated that cessation of this service would result in the

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consumption of 4.5 to 5 million additional gallons of gasoline per year by substituted automobile traffic. We found an urgent need for continued service on this line and on March 20, 1980, permitted the Illinois Regional Transportation Authority (RTA) to provide service as a "directed rail carrier", without Federal subsidization under Directed Service Order No. 1437, supra.

REVENUES AND EXPENSES

The Rock Island's financial condition is bleak. While the carrier's total railway operating revenues have increased yearly since 1968 (with the exception of 1975), expenses have increased more rapidly and the operating ratio has ranged from a low of 79.6 in 1971 to a high of 85.1 percent in 1977. (The figures for 1978 are not comparable because of accounting changes.) In addition, the increasing revenues reflect price increases and mask a steady decline in traffic. See Appendix C.

Net railway operating income was negative for the years 1968 through 1978. These losses have increased from $6.5 million in 1968 to $38.5 million in 1977. In addition, for the period 1968 through 1977, Rock Island has had negative working capital in all years except 1973 and 1976. See Appendix B. The positive working capital for those two years is attributed to increases in temporary cash investments, decline in accounts and wages payable, and accrued tax liability. When Rock Island filed for protection under Section 77 of the Federal Bankruptcy Act it was allowed to defer interest and principal payments on its debt, thereby bolstering its cash position.

The Rock Island's rate of return has been negative in all the years under study, and the substantial net losses every year have resulted in a decrease in the amount of stockholders' equity.

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Long-term debt due within one year has remained somewhat constant, decreasing only slightly with the exception of 1978. The increase in 1978 is attributed to an accounting change. The carrier's long term debt due after one year increased drastically in 1978, but this again is due to an accounting change.

The stockholders' equity has been shrinking since 1968, and this, combined with the carrier's increasing level of debt, has resulted in a rapidly increasing debt-equity ratio. During the period 1968 to 1974 the percentage remained fairly constant (between 30.8 percent and 34.2 percent). However, the ratio rose to 38 percent in 1975, 43.7 percent in 1976, and 51.7 percent in 1977. Without positive earnings in the future, this trend will continue. The Rock Island has been consistently unable to meet its fixed charges payments because no income was available.

MAINTENANCE COSTS

In July 1979, FRA conducted an inspection of approximately 52 percent of the main track of the Rock Island. The purpose of this 3,992 mile inspection was to determine the general condition of the track structure and assess Rock Island's ability to maintain its facility in compliance with Federal regulations. The mileage inspected was not limited to a single area, and track in each Rock Island division was included in this survey.

Many serious problems were revealed. Of the miles inspected, 1,934 or 48.4 percent did not comply with the requirements for the posted speed. Of greater concern to FRA was the fact that 24 percent (957 miles) did not comply with the standards for Class I. A copy of this FRA Track Assessment Report is attached as Appendix I.

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The condition of Rock Island's ties was the area of greatest concern in the FRA inspection report. Estimates reveal that it will require over 428,000 ties to bring the surveyed track into compliance with Class I. To bring the track into compliance with the timetable speeds, it is estimated that 2,395,000 ties are needed. Rock Island also has serious rail problems with an estimated 44,000 rails (of 39 foot long rail) needed to bring the track into compliance with FRA requirements.

Rock Island has reported: defered maintenance-road on the line $213.7 million, defered maintenance-equipment $20.8 million, delayed capital improvements-roads $82.7 million, and delayed capital improvements-equipment $77.9 million.

In summary, Rock Island has an immediate need for substantial rehabilitation throughout its system, but it cannot meet this need because of its steadily declining revenue base and severe financial problems.

EFFECT ON SHIPPERS AND COMMUNITIES

In October and November 1979, we held 24 days of public hearings in 17 cities throughout the Midwest to determine the need for continued directed service over the Rock Island. The Rail Services Planning Office (RSPO) prepared a report from the hearing transcripts and written statements which were submitted at these hearings. RSPO concluded that the public consistently deemed Rock Island's services essential for the following reasons:

(1) captive shippers;

(2) higher transportation costs by truck;

(3) infeasible truck transportation because of rail dependent commodities, inaccessibility to highways, weight limitations, and poor road conditions;

(4) shutdowns or relocations of businesses would result from a cessation of service;

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(5) full grain elevators; and (I-12)

(6) a need to preserve competition.

At a number of the hearings, witnesses emphasized that the Rock Island was critical to the movement of the Nation's grain since in 1978 it moved 10 percent of the Nation's western grain.

During the strike by Rock Island employees, (August-October 1979), shippers had to try to find alternate transportation. Impacts on shippers from the strike included: no service and consequent shut downs; employee lay-offs; depletion of existing inventories; increased grain storage; discounted prices on products sold; and higher transportation charges (if alternate transportation was available). These same impacts will result if the entire Rock Island system is abandoned without some provision for continued service.

We recognize the adverse effects which abandonment would have on shippers, communities, and the local public. In making our recommendations, we must consider the burden which future operations would have on the Rock Island. We must also keep in mind that it is highly unlikely Rock Island will be able to start up operations which have been discontinued since August 1979.

EFFECT ON EMPLOYEES

Abandonment of the Rock Island would also harm local economies due to the multiplier effect of losing the railroad employees' salaries. The number of employees was 8,675 prior to the strike, while KCT employed 8,270 during directed service. The number of Rock Island employees now working is unknown, while those that will be working after abandonment and acquisition cannot even be estimated (see Appendix J).

NATIONAL DEFENSE

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DOD concerned itself with the impact of a cessation of Rock Island service on defense installations at the Twin Cities Army Ammunition Plant, MN; Fort Sill, OK; Houston Port, TX; McAlester Army Ammunition Plant, OK; McConnel Air Force Base, KS; and Rock Island Arsenal, IL. Rail service to these facilities is considered necessary for their efficient operation in peacetime, and essential during mobilization periods. All installations but the Rock Island Arsenal have alternate rail transportation. Service to the Rock Island Arsenal will be discussed later.

ABANDONMENT CRITERIA

The application to abandon its entire line and trackage rights, and to discontinue operations, submitted to this Commission by the Rock Island is governed by the criteria of 49 U.S.C. §10903. Section 17(a) of the MRRA transferred jurisdiction over Rock Island abandonments from this Commission to the Bankruptcy Court which has jurisdiction over the proposed termination of all railroad operations by Rock Island.

We are submitting our recommendation to the Court pursuant to Section 17(b)(2) of the MRRA and 11 U.S.C. §1170. Our role under 11 U.S.C. §1170 is that of an advisor since the Bankruptcy Court has the final authority over the abandonment of lines of bankrupt railroads pursuant to the Bankruptcy Code.

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Section 19 of the MRRA removes from consideration in bankrupt railroad abandonment proceedings, the National Environmental Policy Act.

Our duty under 49 U.S.C. §10903 is to determine whether the public convenience and necessity warrant abandonment. In making this determination, we must weigh the hardships the abandonment will impose upon the shippers and communities involved, against the present and future burden which would be imposed on the railroad and interstate commerce by continued operations. Colorado v. United States, 271 U.S. 153 (1926).

DISCUSSION

General. The abandonment of an entire rail system the size of the Rock Island requires a weighing of national defense, energy conservation, and rural and community development as well as economic consequences such

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as lack of rail service, unemployment, and higher shipping charges in light of the burden of continued Rock Island operations on interstate commerce and the rights of Rock Island's creditors. By adopting our recommendations, the Bankruptcy Court can achieve an equitable balance of these factors.

Our weighing of the evidence in this proceeding convinces us that highly persuasive arguments in favor of Rock Island's abandonment come from its physical (a deteriorated plant requiring hundreds of millions of dollars to upgrade) and fiscal condition (staggering losses for over a decade). Counter arguments of need for continued service and employee impact over the entire system that have been made are not as persuasive. With regard to the entire system, Rock Island's creditors (Continental, First National, Crown, and SRI) support abandonment, while RLEA opposes the abandonment on the grounds that cashlessness is a transitory phenomenon.

Rock Island's cashlessness of September 1979 was the result of an arduous and painful erosion of its traffic base and facilities. Its current financial condition suffers from the same malaise, with a huge retained earnings deficit. In our judgment, this situation will not change and, as a corporate entity and a railroad the Rock Island has failed. We would not require this entity to continue to provide services, or even exist. However, we would make provision for the continuation of essential services.

Valuation. Essential services can be maintained through the sale of rail lines to either existing railroads or new railroads. These sales must be the result of arms-length negotiation. The Trustee has a fiduiary duty to maximize the assets of the estate for the benefit of

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creditors, while the purchasers cannot be expected to invest in a line at a price above which they can earn a reasonable return. We raise this issue in light of the paucity of contracts to sell entered by the Trustee, and the position taken in this proceeding by N&W. (I-16)

N&W as a party negotiating to buy a line, indicates that Rock Island has insisted on a price related to the gross freight revenues produced by a rail line. We do not think this is reasonable. It fails to take into account the properties' condition or the traffic which must be recovered. On the other side of the coin, N&W suggests that the Trustee be satisfied with the net liquidation value of the segment. Although this method of valuation is more appealing, it fails to account for whatever value (if any) the property would have as a railroad going concern.

In order for essential rail service to be preserved, the Bankruptcy Court must require the Trustee to negotiate the sale of Rock Island's lines expeditiously and at reasonable prices.

Employee protection. RLEA urges that we recommend employee protection at a level greater than required by New York Dock Ry.-Control-Brooklyn Eastern Dist., 360 I.C.C. 60 (1979). New York Dock protection is apparently mandated by section 17(a) of the MRRA. However, under that section the duty to impose employee protection squarely rests with the Bankruptcy Court. We will make no recommendation, but will point out certain options that the Court has.

The New York Dock conditions can be imposed on the Rock Island. However, another viable option is not to impose any form of labor protection. In past instances where entire rail systems have been abandoned and no company would reap the benefits of the abandonment, we have found the

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imposition of employee protective conditions not to be warranted. See, Wellsville, Addison & Galeton R. Corp.-Abandonment, 354 I.C.C. 744, 746 (1978). Finally, the entire issue of imposing employee protective conditions may be rendered moot shortly by Congressional action.

Individual rail lines. The Rock Island can be broken into 4 major rail line for consideration of the abandonment: (1) the Twin Cities to Galveston; (2) Denver to Chicago; (3) Tucumcari, NM to St. Louis; and (4) Tucumcari, NM to Memphis. We will discuss each line in turn and then make our ultimate recommendations.

(1)Twin Cities--Galveston Line. This 1,414 mile line runs between Minneapolis-St. Paul and Galveston via Des Moines, Kansas City, Wichita, Oklahoma City, Fort Worth, Dallas, and Houston. This line also consists of numerous branch lines in Minnesota, Iowa, Kansas and Oklahoma. The northern portion of the line serves Minnesota, Iowa, and Missouri, while the southern portion serves Kansas, Oklahoma, and Texas.

(a) Northern Segment. MN-DOT filed a comment expressing opposition to the abandonment, unless the lines are operated by another carrier. MN-DOT identifies the Rock Island main line between the Twin Cities and Kansas City as essential to the economy of the State and to the midwest rail system. In particular, MN-DOT is concerned about service to towns which are dependent on the Rock Island for service such as Clarks Grove, Ellendale, and Hope, on the main line, and Worthington on a branch line.

In addition, MN-DOT is concerned that if the Commission recommends granting the abandonment, it will no longer have the authority to order directed interim service, and thus, there would be no service over the involved lines during the

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Other. There are three other matters that this report will cover before making our final recommendations.

Rock Island has requested permission to abandon 5 subsidiaries, two of which are jointly owned with other railroads. Rock Island's subsidiaries which are wholly owned should be abandoned. However, where the subsidiary is jointly owned, as are Galveston Terminal and Oklahoma City Jct., neither we nor the Bankrupt Court can permit their abandonment, since the subsidiary railroads are not considered bankrupt.

Our jurisdiction over abandonment of these railroads can only be effectuated by the filing of an application under 49 U.S.C. §10903. The Bankruptcy Court, on the other hand, has no jurisdiction over the Galveston Terminal or Oklahoma City Jct., since neither is bankrupt or a wholly owned subsidiary of Rock Island. The proper course involving these two railroads is for Rock Island to sell its ownership interest.

It is also appropriate here to advise persons interested in acquiring and operating Rock Island lines of the procedures they must follow. There are two types of lines involved which require different procedures to be followed, those abandoned and those not abandoned.

A line that has been abandoned is no longer a line of railroad as that term is used in section 17(b)(1) of the 4RRA. Therefore, acquisition of that type of line requires an agreement with the Trustee, and approval of the agreement by the Bankruptcy Court. If the buyer wants to operate as a railroad over the acquired line, it must then come to the Commission for a certificate of public convenience and necessity to operate the line. This is governed by 49

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U.S.C. §10901. The regulation regarding the application are found at 49 CFR Part 1120. While an application is pending temporary service may occur under an emergency Service Order from our Railroad Service Board. The Commission's staff is available to anyone with questions or needing advice in this area. (I-19)

For Rock Island lines that are not abandoned, their sale is subject to the requirements of section 17(b) of the MRRA. The procedure to be followed requires an agreement with the Trustee, approved by the Bankruptcy Court. An application must be filed with us complying with 49 CFR Part 1111, Subpart B, Acquisition Procedures for Lines of Railroads in Reorganization, 45 Fed. Reg. 6107 (1980). Upon the filing of this application the Bankruptcy Court may permit the buyer to operate interim service over the line to be purchased. See, Section 17(b)(3) of the MRRA. Again the Commission staff is available to provide assistance.

Were this a normal abandonment proceeding, we would find that because of its poor financial condition, deteriorated physical plant, and eroded traffic base that the present and future public convenience and necessity permit the abandonment of Rock Island's entire system as an entity upon the conditions that it: (1) keep in place and attempt to sell, upon reasonable terms, all lines in Appendix D for continued rail service; (2) keep in place all other lines for which offers have been received prior to the hearing before the Bankruptcy Court; and (3) not abandon any lines for which purchase applications are pending. We base our recommendations on this.

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RECOMMENDATIONS

We recommend the following to the Bankruptcy Court:

1. The Trustee should be authorized to abandon the entire Rock Island system consisting of 10,468 miles including 8,139 miles of main track, 2,329 miles of branch lines, and to discontinue service over 763.20 miles of trackage rights conditioned upon:

(a) Keeping in place and attempting to sell, for a reasonable period of time, upon reasonable terms, all portions of the Rock Island in Appendix D for continued rail service; and

(b) not permitting abandonment of any line for which a purchase application is pending with the Commission.

2. If, by the scheduled date of commencement of Court hearings in this proceeding, a financially responsible person comes before the court and offers to acquire any other of Rock Island's lines sought to be abandoned, the Court should postpone authorizing the abandonment of these lines for which offers had been made for a reasonable time to permit negotiations.

3. The Court should require the Trustee to keep intact the tracks and rail facilities of those lines which are listed in Appendix D or are subject to applications or offers to purchase for a reasonable period of time. The Trustee should be authorized to dispose of those lines which are not subject to offers to purchase.

4. The Court should permit prospective purchasers to provide interim service over the line until sales are consummated.

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By the Commission, Chairman Gaskins, Vice Chairman Gresham, Commissioners Stafford, Clapp, Trantum, Alexis, and Gilliam. Commissioner Stafford concurring in part, dissenting in part with a separate expression. Commissioner Alexis absent and not participating.

(SEAL)

AGATHA L. MERGENOVICH
Secretary

COMMISSIONER STAFFORD, concurring in part, dissenting in part:

I agree with the majority's conclusions with one exception, that is the failure to include the Denver-Omaha/Kansas City main line in Appendix D (See page 33.).

If the court agrees that this line is not worthy of being "kept intact" the practical result means the end of rail service to one of this country's greatest grain producing areas. The economic and social consequences to the communities located on the line were well documented at the public hearing we held at Phillipsburg, KS last October. They range from increased costs of at least 25¢ per bushel to the farmer to millions of dollars needed to upgrade highways in order to accommodate the increased truck traffic. In short, there is a serious question as to whether the grain can in fact be moved by truck.

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